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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MARCH TERM, 2001

FRANCISCO VASQUEZ,

Petitioner,

v.

ATTORNEY GENERAL; COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE; AND STEVEN J. FARQUHARSON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE (BOSTON),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE FIRST CIRCUIT COURT OF APPEALS CORRECTLY DETERMINED IT LACKS PERSONAL JURISDICTION OVER THE ATTORNEY GENERAL AS CUSTODIAN OF THE PETITIONER.

2. WHETHER THE UNITED STATES DISTRICT COURT FOR THE FIRST CIRCUIT HAS SUBJECT MATTER JURISDICTION TO HEAR PETITIONER'S PETITION FOR HABEAS CORPUS AND OTHER RELIEF

3. WHETHER THERE ARE "EXCEPTIONAL CIRCUMSTANCES" SO THAT THE UNITED STATES DISTRICT COURT OF MASSACHUSETTS IS THE PROPER FORUM FOR PETITIONER'S CLAIMS TO BE HEARD

4. WHETHER THE PERMANENT RULES DIVEST THE UNITED STATES DISTRICT COURTS OF HABEAS JURISDICTION

5. WHETHER THE PETITIONER IS ELIGIBLE FOR RELIEF UNDER SECTION 212(C) OF THE IMMIGRATION AND NATIONALITY ACT AS IT EXISTED PRIOR TO APRIL 24, 1996

6. WHETHER THE APPLICATION OF AEDPA's PROVISIONSTO THE PETITIONER-APPELLANT, STRIPPING FROM HIM THE RIGHT TO APPLY FOR RELIEF FROM DEPORTATION UNDER SECTION 212(C) VIOLATES THE FUNDAMENTAL CONCEPTS ARTICULATED IN LANDGRAF V. USI FILM PRODUCTS,114 S.Ct. 1504 (1994).

7. IN ANY EVENT, WHETHER ACTUAL RELIANCE ON PRIOR LAW IS NECESSARY TO SHOW IMPERMISSIBLE RETROACTIVE EFFECT OF A NEW LAW.

PARTIES TO THE PROCEEDINGS

The Petitioner is a citizen of the Dominican Republic who entered the United States on October 1, 1987 as a Lawful Permanent Resident ("green card" holder) and therefore has accumulated well over ten years of residence in the United States.

The Respondent, the Attorney General, is being sued in his official capacity as the Attorney General of the United States. In this capacity, he is responsible for the administration of the immigration laws, pursuant to 8 U. S.C., Section 1103 , and he possesses extensive discretionary powers to grant certain relief to aliens.

The Respondent, the Commissioner of the Immigration and Naturalization Service, is being sued in her official capacity as the Commissioner of the Immigration and Naturalization Service. In this capacity, she is also responsible for the administration of the immigration laws and has executive authority over the INS.

The Respondents INS and U.S. Department of Justice are the agencies responsible for enforcing for Immigration and Nationality Act ("INA").

The Respondent, Steven J. Farquharson, is being sued in his official capacity as District Director of the Boston District of the Immigration and Naturalization Service. In this capacity, he is empowered to carry out the deportation order against the Petitioner.

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JURISDICTION

This Court has jurisdiction by virtue of 28 U.S.C. §1254(1). This is an appeal from a final judgment entered by the United States First Circuit Court of Appeals on December 8, 2000 reversing a decision rendered on April 21, 2000, by the Honorable Judge William G. Young of the United States District Court for the District of Massachusetts.

This action arose in the United States District Court under the U.S. Constitution, the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. Section 1101 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C., § 701 *et seq.* Goncalves v. Reno, 144 F.3d 110, (1st Cir,. 1998), cert. denied, 119 S. Ct. 11409 67 U.S.L.W. 3555 (March 8, 1999), The Administration Procedures Act (APA) provides additional support for jurisdiction. That Act directs agencies to conclude matters presented to them "within a reasonable time," 5 U.S.C. § 555(b) (1982), and stipulates that the "reviewing court shall -- compel agency action withheld or unreasonably delayed." 5 U.S.C. § 706(l) (1982). Further, the United States District Court has jurisdiction over this action pursuant to the provisions of 5 U.S.C. § 706(1), which gives a reviewing court authority to compel unlawfully withheld or unreasonably delayed agency action, and 28 U.S.C. § 1361, which gives federal courts the authority to issue all writs necessary or appropriate in aid of their respective jurisdictions.

The United States District Court has Habeas Corpus jurisdiction pursuant to 28 U.S.C., Sections 2241 *et seq.;* Art. 1, Section 9, Cl. 2 of the U.S. Constitution ("Suspension Clause"), and the Common Law.

In the alternative, petitioner asserts jurisdiction pursuant to new Section INA 242 at 8 U.S.C. 1252 (Supp. 1111997).

This Honorable Court may also determine that the U.S. District Court could properly exercise jurisdiction pursuant to 28 U.S.C., Section 1361 (mandamus jurisdiction) and 28 U.S.C. Section 1331, and may grant relief pursuant to Declaratory Judgment Act, 28 U.S.C. Sections 2201 *et seq.* and the All Writ Act, 28 U.S.C. Section 1651.

Although the petitioner is being detained by the INS in Oakdale, Louisiana, the United States District Court has jurisdiction to hear this matter as petitioner's last domicile and usual place of residence was in Lawrence, Massachusetts.

In addition, he was taken into custody by the INS in Boston, Massachusetts and held for a time in an INS detention facility in Hillsborough, New Hampshire. Further, Janet Reno has offices in all of the (50) states and in Boston, Massachusetts which permits this Court to exercise jurisdiction over this matter. Jose Pena-Rosario v. Janet Reno, e al, U.S. Dist. Ct. Eastern Dist. New York, 99-CV-4652 and companion cases, 99-CV-6193, 99-CV-.7054, 99-CV-7114, 99-CV-7630.

The United States Court of Appeals for the First Circuit from which the Petitioner files this Petition entered a judgment in this matter on December 8, 2000. This Petition is filed under Supreme Court Rule 11 and in compliance therewith.

STATUTES AND CONSTITUTIONAL PROVISIONS

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STATEMENT OF THE CASE (INCLUDING BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE)

Petitioner, a citizen of the Dominican Republic, was a legal permanent resident in the United States for thirteen years. In February 1999, the Immigration and Naturalization Service ("the Service") served the Petitioner a Notice to Appear alleging he was removable for having been convicted in 1993 for receiving stolen property and 1994 for a controlled substance violation. The Petitioner's controlled substance violation was vacated on the merits and is no longer a grounds for deportation or removal from the United States. However, the Service alleges the Petitioner is removable (i.e. deportable) for his 1993 "theft" offense.

At the time of the Petitioner's 1993 and 1994 offenses, long-time permanent resident aliens were permitted to apply for relief from deportation in an application under section 212(c) of the Act. However, in 1996, Congress enacted Anti-terrorism and Effective Death Penalty Act of 1996 , Pub. L. No. 104-132. 110 Stat. 1213, 1277 ("AEDPA") and the Illegal Immigration and Immigrant Responsibility Act (IIRIRA) which the Service alleges prevents aliens, such as the Petitioner, from applying for 212(c) relief if they

were served after April 1, 1997 with a Notice to Appear for removal proceedings.

On September 27 1999, the Immigration Judge in Oakdale, Louisiana denied all forms of relief to Mr. Vasquez, and ordered him removed to the Dominican Republic because of his 1993 "theft" conviction in Newburyport District Court in Massachusetts, which entered as a consequence of a guilty finding by a jury of six. Mr. Vasquez, through counsel, timely filed a Notice of Appeal disputing the decision of the Immigration Judge dated September 27, 1999, and followed that Notice with a supporting Brief on December 29, 1999.

After the Massachusetts District Court in Lawrence, Massachusetts vacated Petitioner-appellant's 1994 conviction a Motion To Terminate Proceedings was filed with the Immigration Judge although no decision was forthcoming. The Immigration and Naturalization Service ("INS") kept the Petitioner-appellant in its custody, while it filed additional charges against him. He was deemed to be removable because of his 1993 "theft" conviction in Newburyport, District Court in Massachusetts, which entered as a consequence of a guilty finding by a jury of six.

On March 6, 2000, the Board of Immigration Appeals (B.I.A.) dismissed Petitioner-appellant's appeal on the merits. Thereafter, on April 4, 2000, Petitioner-appellant submitted to the United States District Court for the District of Massachusetts a Petition For Writ of Habeas Corpus.

On April 21, 2000, the Honorable Judge William G. Young, entered a decision on Petitioner-appellant's claims. Briefly stated, in that Memorandum Judge Young determined that the United States District Court for the District of Massachusetts had subject matter jurisdiction to hear the claims of Petitioner-appellant, that personal jurisdiction could be exercised over Attorney General Janet Reno as the custodian of Petitioner-appellant, and that venue was proper at United States District Court for the District of Massachusetts. Judge Young denied the claim of Petitioner-appellant on the merits, but determined that he was not entitled to apply for discretionary relief pursuant to Section 212(c) of the Immigration and Nationality Act as it read prior to the Anti-terrorist and Effective Death Penalty Act (AEDPA) of April 24, 1996.

The Petitioner appealed the Honorable Judge Young's decision to the United States Court of Appeals for the First Circuit. On December 8, 2000, the First Circuit found that it had subject matter jurisdiction over the dispute. However, the First Circuit concluded that the Attorney General is not the custodian of an alien for the sake of the filing of a habeus petition and vacated the merits based decision of the United States District Court for the District of Massachusetts.

REASONS FOR GRANTING WRIT OF CERTIORARI

1. The United States District Court has Jurisdiction over the Attorney General as the Custodian of the Petitioner

a. The Attorney General has the Power to Produce the Petitioner and is the Ultimate Decision-Maker of the Petitioner's Custodial Status

The Attorney General is the proper respondent in this matter because he has the power to direct subordinates to detain the Petitioner. This view finds ample support in federal case law. For example, in Nwanko v. Reno, 828 F.Supp. 171, 173-174 (E.D.N.Y. 1993), the district court noted:

> "While [the Attorney General] may have delegated to h[is]subordinates physical custody of the petitioner as well as the determination concerning his detention, the Attorney General is an appropriate respondent in a habeas corpus proceeding because he has the power to direct h[is] subordinates to carry out any order directed to h[im] to produce or release the petitioner."
>
> Nwanko, 828 F.Supp. at 173-174 citing Ex Parte Endo, 323 U.S. 283 304-05, 89 L.Ed. 243, 65 S.Ct. 208 (1944).

Several other courts arrive at a similar result. See, e.g., Mojica v. Reno, 970 F.Supp. 130 (E.D. N.Y. 1997); Pena-Rosario v.

Reno, 83 F.Supp. 2d 349 (E.D. N.Y. 2000); Sivongxay v. Reno, 56 F.Supp. 2d 1167 (W.D. Wash. 1999); Pottinger v. Reno, 51 F.Supp. 2d 349, 357 (E.D. N.Y. 1999); but see Yi v. Maugus, 24 F.3d 500, 507 (3rd Cir. 1994)(Atttorney General is not the proper respondent); Guerra v. Meese, 252 U.S. App. D.C. 1, 786 F.2d 414, 416 (D.C. 1986).

Courts that find the Attorney General is not the proper respondent in a habeas petition apply a day-to-day control analysis and usually conclude that the prison warden or the INS local district director is the proper respondent in a habeas petition. See Arias-Agramonte v. Commissioner of INS, 2000 U.S.Dist. LEXIS 15716 at *24-25 (S.D. N.Y. November 2, 2000). For example, several district courts in the Second Circuit have adopted the day-to-day control test advanced in Billiteri v. United States Board of Parole, 541 F.2d 938, 948 (2nd Cir. 1976). In Billiteri, the petitioner named the United States Parole Board as the respondent in his petition for habeas relief. The Second Circuit rejected the Petitioner's arguments, finding that federal prisoners must name the warden of the facility and not the Parole Board, largely because the Parole Board lacked control over the day-to-day activities of the petitioner. Id.

However, this reasoning is clearly inapposite in this matter. As aptly noted in Mojica, supra at 167, and Arias-Agramonte, supra at *24-25, the Billiteri decision rested on the structure of the federal detention system. Clearly, the Parole Board is not an agent or delegate of the prison warden. See id. However in this matter, there is no such bifurcation of responsibilities; rather, Congress has delegated the authority to detain, release and supervise the day to day activities to the Attorney General. See 8 U.S.C. §1226(c)(1) and §1126(b). The Attorney General wields his authority over the Petitioner but chooses to delegate his authority to his subordinates in the INS who in turn delegate their authority to the wardens. See, e.g., Mojica, supra at 167; Arias-Agramonte, supra at *24-25. Although the delegation scheme may artificially insulate the Attorney General from controlling the day-to-day activities of the petitioner, the reality is quite the opposite: the Attorney General remains responsible for the maintainence of aliens in custody. See id.

Indeed, such a narrow construction of the habeas statute would itself lead to a rueful conumdrum. Clearly, naming a prison warden to the petition is proper. See Billiteri, 541 F.2d at 948. But in truth, a prison warden is in a position nearly identical to the Attorney

General with respect to the petitioner. The prison warden, while maintaining supervisory control over the prisoners, may rarely actually participate in the day to day control over the detainee. The warden delegates his/her authority to prison guards who actually exercise day-to-day control over the petitioner. Following the logic of decisions like Billiteri, the petition for habeas relief is more properly directed against the actions of these guards and not even the prison warden. However, courts are wise enough to forgo the confines of this logic by allowing the petitione to name the supervisoer of the facility as the respondent in the petition.

In the same manner, the Petitioner seeks to name the Attorney General as the proper respondent. Like the Prison Warden, the Attorney General is vested with the authority to supervise and control individuals, the only significance being that the individuals controlled are aliens. See 8 U.S.C. §1223(a) ("Whenever the Attorney General has received information showing that any aliens are coming from a country [hosting certain diseases] such aliens shall be detained by the Attorney General"; §1226(c)(1) ("The Attorney General shall take into custody any alien who [is deportable or inadmissible for the commission of a crime"]; §1126(b)("the Attorney General may revoke a bond or parole..."). As such, it is the Attorney General who ultimately has responsibility over the day to day activities of the Petitioner.

B. THE PLAIN LANGUAGE OF THE HABEAS STATUTE, READ WITH IMMIGRATION AND NATIONALITY ACT, SUPPORTS NAMING THE ATTORNEY GENERAL AS THE PROPER RESPONDENT AS CONSISTENT WITH CONGRESSIONAL INTENT.

As a paramount rule of statutory construction, courts look to "the statute's language, structure, subject matter, context and history to glean congressional intent." Arias-Agramonte, 2000 U.S. Dist. LEXIS 15716 at *21-22. The INA limits judicial review of immigration judge and Board of Immigration Appeals (BIA) decisions to final orders of removal and specifically provides that the respondent is the Attorney General. See id. This plain reading strongly suggests that Congress intended the Attorney General as the proper respondents where Article III courts, such as the United States District Court for

the District of Massachusetts, reviewed the removal order. See id. While judicial review and habeas petitions are not exactly the same, their fraternal nature coupled with the congressional intent that the Attorney General is the proper respondent in the review of deportation orders suggests that a true reading of the habeas statute (28 U.S.C. §2241) and the INA allows the Attorney General to be the proper respondent in all matters involving deportation. See id. at 22-23; Alcaide-Zelaya v. McElroy, 2000 U.S. Dist. LEXIS 15714 (S.D.N.Y. 2000).

C. ALLOWING THE ATTORNEY GENERAL AS THE PROPER RESPONDENT IN A PETITION FOR HABEAS CORPUS BLOCKS THE POTENTIAL FOR FORUM SHOPPING AND ENHANCES JUDICIAL ECONOMY.

As noted earlier, the Fifth Circuit in Max-George v. Reno, 2000 WL 220502 (5th Cir. February 24, 2000) flatly rejected the availability of habeas corpus review for aliens. As a result, transferring alines from facilities in the First Circuit, where habeas review survives, to facilities in the Fifth Circuit will stiffle the right statutory right to habeas corpus review. Therefore, such transfers, which are now routine, would have widespread implications. First, while there is no evidence of foul play by the INS in this matter, the fact that habeas petitions are not available to alien detainees in the Fifth Circuit is a powerful incentive for the government to augment the transfers and thus, expediting the removal process. See Alcaide, supra at *13-14 citing Henderson v. INS, 157 F.3d 106, 125-7 (2nd Cir. 1998), cert. denied subnom. Reno v. Navas, 526 U.S. 1004 (1999). Allowing the Attorney General to be named as the respondent to the habeas petition would halt the potential for such abuse of process. On the other hand, the concerns over aliens forum shopping can easily be allayed with traditional venue analyses which are typically employed after the review of personal jurisdiction. See Henderson, 157 F.3d at 128.[1]

Additionally, as is oftne noted, if aliens are forced to name exclusively the warden of the alien detention center, district courts located near the detention centers would suffer a disproportionate

[1] As the United States District Court correctly opines in Alcaide, there would not be concerns about forum shopping if the law on jurisdiction over alien habeas petitions was uniform. See Alcaide, supra at n.4.

number of habeas petitions in comparison to district courts where the aliens lived and perhaps were convicted of the deportable offenses prior to detention. See, e.g. Henderson, 157 F.3d at 128; Emejule v. INS, 989 F.2d 771-772 (5th Cir. 1993)(noting the overwhelming number of habeas petitions in the Fifth Circuit). Thus, allowing the Petitioner to name the Attorney General as the respondent and file in the United States District Court in Massachusetts would expedite the flow of petitions through the judiciary.

2. The Petitioner is Entitled to a Hearing on the Merits of His Application for Relief Under Section 212(c) of the Act

A. THE UNITED STATES DISTRICT COURT FOR THE FIRST CIRCUIT HAS SUBJECT MATTER JURISDICTION

The Petitioner-appellant 'adopts the decision and reasoning of the Honorable Judge William G. Young in his Memorandum of April 21, 2000 in which he determined that the United States District Court had subject matter jurisdiction to hear Petitioner-appellant's habeas petition. A copy of that Memorandum is attached hereto and is specifically incorporated herein by reference. In further support of this conclusion, Petitionerappellant offers the following legal arguments.

The ultimate question at this juncture in this case is one of forum: a determination of which federal court has jurisdiction to hear petitioners' requests. This jurisdictional controversy developed after the enactment of AEDPA on April 24, 1996. That statute included two judicial review provisions relevant to immigration cases. Section 401(e) of AEDPA repealed § 106(a)(10) of the Immigration and Nationality Act, which had expressly provided for habeas review of immigration cases in the federal courts; § 440(a) of AEDPA substituted the following language in its place: "Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense [covered in the deportation provisions of the INA] shall not be subject to review by any court." 8 U.S.C. § 1105a(a)(10) (repealed by 11R1RA § 306(b) with respect to deportation proceedings commenced after April 1, 1997). On September 30, 1996, Congress enacted IIRIRA, which changed many of the amendments that AEDPA had made. Xu

Cheng Lian v. I.N.S. et al., Doc. No. 99-5053, No. 99-5327, No. 99-6039; U.S. Ct. Appeals 3rd Circuit, 2000 U.S. App. Lexis 3586, Argued December 20, 1999 and Filed March 9,2000.

In Goncalves v. Reno, 144 F. 3d 110 (1st Cir. 1998) and Sandoval v. Reno, 166 F. 3d 225 (3d Cir. 1999), the Courts were faced with that issue. Petitioners had filed a petition for a writ of habeas corpus in the district court. Goncalves argued that AEDPA's amendment of § 212(c) to permit discretionary waiver of removal for aliens did not apply to cases in which applications for a 212(c) Waiver were pending on the date of enactment of AEDPA. On appeal from the district court, the First Circuit agreed with Goncalves' statutory construction and granted the writ on the ground that AEDPA § 440(d) did not apply to cases where a 212(c) waiver of inadmissibility was pending when the statute was enacted. Xu Cheng Lian v. I.N.S. et al., Doc. No. 99-5053, No. 99-5327, No. 99-6039; U.S. Ct. Appeals 3rd Circuit, 2000 U.S. App. Lexis 3586, Argued December 20, 1999 and Filed March 9, 2000.

Following the reasoning of Sandoval and Goncalves v. Reno, supra, that neither AEDPA amendments nor transitional rules of IIRIRA divest district courts of habeas jurisdiction because the applicable sections "[do] not refer to § 2241 "); Bowrin v. INS, 194 F. 3d 483, 489 (4th Cir. 1999) (per curiam) ("Finding no ... specific reference to § 2241, apply the long standing rule disfavoring repeal of jurisdictional provisions by implication."); Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1145-46 (10th Cir. 1999) (holding that "the lack of any mention of § 2241 habeas review in the plain language of the statute, combined with the long historical precedent surrounding habeas corpus review in immigration cases, establishes that t raditional habeas review under § 2241 survived the enactment of AEDPA § 440(d) and IIRIRA § 309(c) [the transitional rules]") petition for cert. filed, U.S.L.W. (U.S.Jan.31,2000)(No.99 7964); Shah v. Reno, 184 F.3d 719, 724 (8th Cir. 1999) ("In sum, we hold that Congress in enacting A-EDPA and IIRIRA in 1996, did not clearly and expressly repeal 28 U.S.C.~§ 2241."); Mayers v. INS, 175 F.3d 1289, 1301 (11th Cir. 1999) (holding that AEDPA's repeal of INA § 106(a)(10) did not repeal district courts' habeas jurisdiction for cases falling under the transitional rules of IIRIRA), Henderson v. INS, 157 F.3d 106, 118-22 (2d Cir. 1998) (relying on earlier decision in Jean-Baptiste v. Reno, 144 F.3d 212 (2d Cir. 1998), and concluding that without express reference to § 2241 it would not find

bar on federal courts' habeas jurisdiction), cert. denied, 119 S. Ct. 1141 (1999); Goncalves v. Reno, 144 F.3d 110, 119-23 (Ist Cir. 1998) (concluding that repeal of INA § 106(a)(10) did not repeal habeas jurisdiction because there is no explicit reference in AEDPA to habeas jurisdiction under § 2241), cert. denied, 526 U.S. 10049 119 S. Ct. 11409 143 L. Ed. 2d 208 (1999); cf. Requena-Rodriguez v. Pasquarell, 190 F.3d 299 (5th Cir. 1999) (holding that habeas jurisdiction exists under transitional rules but implying that the court might conclude in a case under the permanent rules that language in § 242(g) and § 242(b)(9) is sufficiently express to preclude habeas jurisdiction). Only the Court of Appeals for the Seventh Circuit, interpreting AEDPA and the transitional rules, has held to the contrary. See LaGuerre v. Reno, 164 F.3d 1035 (7th Cir. 1998) (holding that AEDPA § 440(a), amending INA § 106(a), divested district courts of habeas jurisdiction), cert. denied, 68 USLW 3154 (U.S. Feb. 22, 2000) (No. 99-418). Xu Cheng Lian v. I.N.S., et al., 2000 U.S. App. Lexis 3586 (3rd Cir. March 9, 2000).

It is correct that Goncalves and Sandoval involved only the transitional rules, not the permanent rules as is the situation in Petitioner appellant's case, but the legal principle relied upon is valid in the context of the permanent rules. See, e.g., John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 139 (3d Cir. 1998) ("To be sure, there may be a number of factual grounds to distinguish our holding in [an earlier case], but the legal principle announced in that case directly controls the issue presented . . . ."). We unquestionably interpreted Felker in Sandoval as requiring an explicit reference to habeas jurisdiction or its statutory provision in order to find an express congressional intent to repeal. As this court has frequently noted,

B. THE PERMANENT RULES DO NOT DIVEST THE U.S. DISTRICT COURT'S OF THEIR HABEAS JURISDICTION

The government's position is that the permanent rules divest the district courts of their habeas jurisdiction where the transitional rules. Petitioner-appellant disagrees as did Judge Young. The Petitioner-appellant adopts the decision and reasoning of the Honorable Judge William G. Young in his Memorandum of April 21, 2000 in which he determined that the United States District

Court had jurisdiction to hear Petitionerappellant's habeas petition. A copy of that Memorandum is attached hereto and is specifically incorporated herein by reference. In further support of this conclusion, Petitioner-appellant offers the following legal arguments.

INA § 242(a)(2)(C), provides:

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section I I 82(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 12271(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

8 U.S.C. § 1252(a)(2)(C).

INA § 242(a)(1), also in the permanent rules, provides:

"Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is govemed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the-c-ourt may not order the taking of additional evidence under section 2347(c) of Title 28."

8 U.S.C. § 1252(a)(1).

The govemment places its principal reliance for its argument that the permanent rules divest the district courts of habeas jurisdiction on INA § 242(b)(9), which provides:

> "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section."

8 U.S.C. § 1252(b)(9).

The government suggests that because INA § 242(b)(2) requires that all petitions for review "be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings," 8 US.C. § 1252(b)(2), § 242(b)(2) necessarily divests the United States District Court of its habeas jurisdiction.

There is no logical or legal reason why the jurisdictional ruling in this case under the permanent rules should be any different than that which has been reached under the transitional rules.

Although the text of these provisions differs somewhat from the sections of the transitional rules that were considered in Gonealves and Sandoval, supra, those sections, AEDPA § 440(a), 401(e), IIRIRA § 309(c)(4)(G), and INA § 242(g), used language comparably comprehensive. Indeed, the phrase "notwithstanding any other provision of law" in INA § 242(a)(2)(C) also appears in INA § 242(g). See Sandoval, 166 F.3d at 236-38. That phrase did not persuade the Sandoval or Goncalves' Courts to hold that Congress had implicitly repealed § 2241 habeas jurisdiction; there is no reason why it should be any different now. Xu Cheng Lian v. I.N.S. et al., 2000 U.S. App. Lexis 3586, (3rd Cir. March 9, 2000).

In Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 4719 142 L. Ed. 2d 9409 119 S. Ct. 936 (1999), the aliens filed suit in district court seeking injunctive and declaratory relief on the ground that the INS was selectively enforcing immigration laws against them in violation of their First and Fifth Amendment rights. After Congress passed IIRIRA, the government sought to dismiss the case for lack of jurisdiction, arguing that INA § 242(g), made applicable by § 306(c)(1) of IIRIRA to the aliens' cases, deprived the courts of jurisdiction over the selective enforcement claim. In reconciling an apparent conflict between IIRIRA § 306(c)(1), which made INA 242(g) applicable to all cases, including those pending on the date of IIRIRA's enactment, and transitional rule § 309(c)(1)(B), which stated the general rule that the amendments of IIRIRA would not apply to pending cases, the Supreme Court rejected a broad reading of INA § 242(g). The Court held that § 242(g) applied only to "three discrete events along the road to deportation: "the Attorney General's uniquely discretionary decisions to commence

proceedings, adjudicate cases, or execute removal orders. Id. at 482. It compared the limited scope of that section with the more expansive reach of § 242(b)(9) (a "zipper" clause). Id. at 483. Because § 242(g) did apply to the Attorney General's decision to prosecute the plaintiff aliens, the Court held that the district court lacked jurisdiction over the plaintiffs' suit. Xu Cheng Lian v. I.N.S. et al., 2000 U.S. App. Lexis 3586, (3rd Cir. March 9, 2000).

In the case at bar, the government argued orally at the April 5, 2000 Hearing that it was clear from the Court's decision in Reno v. AmericanArab Anti-Discrimination Committee, 525 U.S. 471,142 L. Ed. 2d 940, 119 S. Ct. 936 (1999), concerning § 242(b)(9), that the courts of appeals are the exclusive forum for all immigration claims. This is an inaccurate statement. American-Arab rejected the government's position that the limitation of court jurisdiction in the new INA § 242(g) covered all or nearly all deportation claims. That reading attributes to the discussion in American Arab a meaning that extends beyond the matter at issue, which was the interplay between IIRIRA § 306(c)(1), 309(c)(1)(B), and INA § 242(g). Xu Cheng Lian v. I.N.S. et al., 2000 U.S. App. Lexis 3586, (3rd Cir. March 9, 2000).

The language of INA § 242(b)(9), even without the Court's comparing it with that of § 242(g), makes it evident that § 242(b)(9) was intended to apply to a broader range of decisions than the three categories to which the Court referred in American-Arab. However, that does not mean that the Court intended to hold, without explicit discussion, that § 242(b)(9) has the radical effect of eliminating habeas jurisdiction. In fact, the underlying suit in American-Arab was not a habeas petition under 28 U.S.C. § 2241 but a civil suit for injunctive and declaratory relief that relied for its jurisdiction on 28 U.S.C. § 133 1. The Supreme Court never considered whether IIRIRA divests the district courts of habeas jurisdiction. Rather, the Court noted that there was disagreement in the courts of appeals on the issue and expressed no view on the issue's resolution. See id. at 480 & n.7. "Although we agree that § 242(b)(9) clearly expresses congressional intent that judicial review of questions arising from a proceeding brought to remove an alien be conducted under the INA in the courts of appeals, we do not agree that it clearly expresses congressional intent that the district courts be divested of their habeas jurisdiction under § 2241, one of the issues

considered here." Xu Cheng Lian v. I.N.S. et al., 2000 U.S. App. Lexis 3586, (3rd Cir. March 9, 2000).

Had Congress intended to eliminate all habeas jurisdiction under § 2241, it would have done so by using the same explicit references it used to repeal INA § 106(a)(10), which it did not. Jurado-Gutierrez, 190 F.3d at 1145-46 ("We find the lack of any mention of § 2241 habeas review in the plain language of the statute, combined with the long historical precedent surrounding habeas corpus review in immigration cases, establishes that traditional habeas review under Section 2241 survived the enactment of AEDPA § 440(d) and IIRIRA § 309(c)."); Shah, 184 F.3d at 724 ("AEDPA rather pointedly refers only to Section 106(a)(10) of the old Act. No reference is made to the general federal habeas corpus statute, though that statute was for decades routinely used to review executive decisions in immigration matters); Goncalves, 144 F.3d at 119. Xu Cheng Lian v. I.N.S. et al., 2000 U.S. App. Lexis 3586, (3rd Cir. March 9, 2000).

Lastly, the Suspension Clause provides that "the Privilege of the Writ of Habeas Corpus shall not be suspended, unless, when in Cases of Rebellion or Invasion, the public Safety may require it." U.S. Const. Art. 1, § 9, cl. 2. It is clear that the requisite "trigger" for suspension of Habeas Corpus Relief pursuant to the Suspension Clause has not occurred.

C. THE PETITIONER IS ELIGIBLE FOR RELIEF UNDER SECTION 212(C)- BY THE IMMIGRATION AND NATIONALITY ACT PRE-APRIL 24, 1996.

In Wallace v. Reno, et al, U.S. 1 st Circuit Ct. Appeals, 98-2317 (October 26,1999), the Court held that the "presumption against retroactivity... applies to bar the application of § 440(d) to aliens whosedeportability rests on guilty pleas, entered prior to April 24, 1996." Cited in Matthews v. Reno, 1999 W.L 329688 (D.Mass., 1999).

In Mojica, et al. v. Reno, et al., 97CV1085 (JBW), dated July 3, 1997, the U.S. District Court for the Eastern District of New York noted that the "... retroactive imposition of mandatory deportation provisions would radically alter the 'legal consequences' of a conviction which is an 'event[] completed before [the law's] enactment"'. Citing Landgraf, 511 U.S. at 270, 114 S.Ct. at 1499.

Similarly to what was held in Wallace, supra, and consistent with the reasoning in Mojica, supra, the presumption against retroactivity in this case must apply to bar the application of a subsequent law to this alien, whose deportability rests on pleas and proceedings which took place long before April 24, 1996.

At the time of the offense, trial and sentencing, in 1993, Section 212(c) was available to this Petitioner-appellant and decisions were made consistent with the law such as it existed then, and the disabilities to Petitioner-appellant which attached to those laws. This Petitioner-appellant should not be deprived of rights and privileges that he had at the time of his offense, trial and sentencing.

This Petitioner-appellant was admitted as a lawful permanent resident of the United States on or about January 15, 1987. He therefore meets the Pre- 1996 INA 212(c) requirement of more than seven years of residence in the U.S. While the Petitioner-appellant was arguably convicted of an "aggravated felony" he did not serve five years or more. He is therefore statutorily eligible for a Pre- 1996 INA 212(c) waiver.

The Petitioner-appellant asserts that he remains eligible for relief from removal/deportation pursuant to the provisions of section 212(c) of the Act as it existed at the time of his conviction. Under the Immigration and Nationality Act, aliens who were convicted of various offenses, including controlled substance violations, were subject to deportation pursuant to section 241 (a)(2)(B) of the Act. However, responding to the hardships to lawful permanent residents and the United States citizen families, Congress enacted a waiver of excl tu:labil'ify for lawful permanent resident aliens under section 212(c) of the Act. Until April 24, 1996, the waiver of deportation under section 212(c) was employed by aliens to waive criminal offenses contained under section 24 1 (a)(2)(B) of the Act.

In April of 1996, Congress enacted the Anti-terrorism and Effective Death Penalty Act (AEDPA) which stripped aliens of the ability to apply for waivers of deportability if the aliens were deportable for having committed acts deemed as grounds for deportation under sections 24 1 (a)(2) of the Act. Later in 1996, Congress enacted the Illegal Immigration and Immigrant Responsibility Act of 1996 ("IIRIRA"). IIRIRA codified the provisions of AEDPA in removal proceedings to be commenced on

or after April 1, 1997 by providing a new form of relief termed cancellation of removal under section 240A of the Act. At issue in this controversy is the availability of section 212(c) of the Act for a petitioner whose conduct and conviction, as a result of a trial, occurred prior to the enactment of AEDPA and IIRIRA. Essentially, therefore, the Court must determine the retroactivity of the statutes at issue.

D. THE APPLICATION OF AEDPA's PROVISIONS TO THE PETITIONER-APPELLANT, STRIPPING FROM HIM THE RIGHT TO APPLY FOR RELIEF FROM DEPORTATION UNDER SECTION 212(C) VIOLATES THE FUNDAMENTAL CONCEPTS ARTICULATED IN LANDGRAF V. USI FILM PRODUCTS, 114 S.Ct. 1504 (1994).

When the statutory language is clear on its face, there is no need to inquire into Congressional intent. However, in Landigraf, supra, the Supreme Court reviewed, the issue of how and when to apply a statute retroactively in the absence of clear legislative guidance. In its analysis, the Court explained that where a retroactive application of a statute would offend fairness principles, Courts should not apply the statutes retroactively without the express guidance of Congress. Essentially, in engaging in an analysis of retroactivity, the Court must determine whether (1) Congress has expressly prescribed the statute's proper reach and (2) whether the new statute would, if applied retroactively, impair the rights of a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf 114 S.Ct. at 1505.

In the case of the Petitioner-appellant, the application of §440(d) of AEDPA barring his ability to apply for relief under section 212(c) of the Pre- 1996 Act and its reenactment in IIRIRA, implicates the liabilities and duties espoused in La~dgra As the court stated in Pena-Rosario, "the conflicting evidence [of the enactment retroactive language of AEDPA and IIRIRA] means only that Congress's intent on this question is not clear." Pena-Rosario citing Requena-Rodriguez, 190 F.3d at 307-08; JuradoGutierrez v. Greene, 190 F.3d 1135,1150 (10th Cir. 1999); Asad v. Reno, 67 F. Supp. 2d 886,890 (M.D. Tenn. 1999).

Accordingly, the analysis must proceed to the next step in the Landgraf inquiry: "whether the application of the statute to the conduct at issue would result in a retroactive effect," nl I Martin, 119 S. Ct. at 2003; see also Landigraf, 511 U.S. at 280; Mathews v. Kidder, Peabody & Co., Inc., 161 F.3d 156, 160 (3rd Cir. 1998), cert. denied, 143 L. Ed. 2d 546, 119 S. Ct. 1460 (1999).

Prior to enactment of these statutes, commission of certain crimes meant only the possibility of deportation. Afterwards, it means the certainty of deportation. See Maria, 68 F. Supp. 2d at 230. The replacement of a discretionary regime with a mandatory one is of momentous formal and practical significance. See id. ("Converting a maximum sentence into a mandatory one ... has a retroactive effect."). New legal consequences (automatic as opposed to possible deportation) have clearly been attached to events completed before the statutory enactments. My conclusion is reinforced by the fact that from fiscal years 1989 and 1994, more than half of all aliens who sought § 212(c) waivers secured them. See Goncalves v. Reno, 144 F.3d 110, 128 (Ist Cir. 1998) (citing Mojica v. Reno, 970 F. Supp. 130, 178 (E.D.N.Y. 1997)), cert. denied, 119 S. Ct. 1140 (1999).

There is no dispositive weight on the low probability that an alien actually had the discretionary waiver regime in mind when committing his crime. See, e.g., LaGuerre v. Reno, 164 F.3d 10359 1041 (7th Cir. 1998), petition for cert. filed, 68 U.S.L.W. 3154 (U.S. Sept. 7, 1999) (No. 99-418). Individuals are presumed to act against a backdrop of legal obligations. If they were not, there would be little problem with the retrospective application of many laws; there are likely to be few instances of an individual pouring over a statute book before acting. "Whether or not the operative conduct might have been different, the immigrant has a presumptive right to the imposition of only those consequences which could have attached at the time he committed his act." Maria, 68 F. Supp. 2d at 229. Since applying the statutory bar on discretionary waivers would have a retroactive effect, the "traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." Landigraf, 511 U.S. at 280.

In 1993, the Petitioner-appellant's conduct afforded him the opportunity to apply for relief under section 212(c) of the Act as it existed in 1993, which, while a discretionary application, was his right as a matter of statute. Secondly, the passage of AEDPA and

IIRIRA provided a new duty for the petitioner in regard to past conduct. While the petitioner was previously compelled to act in a non-criminal manner, AEDPA and IIR1RA, if applied retroactively to the petitioner, would impose a duty not only to act non-criminally, but in the event that he committed a controlled substance violation or an aggravated felony, he would be obliged to engage in extensive consideration of the'immigration consequences of declining to enter into plea negotiations to avoid the imposition of severe criminal penalties which would have compromised his rights in subsequent immigration proceedings.

The situation of the Petitioner-appellant is not unlike that found in Pena-Rosario. In Pena-Rosario, the District Court reviewed several petitioner's requests for, among other relief, the opportunity to apply for relief under former Section 212(c) of the Act.

E. IN ANY EVENT, ACTUAL RELIANCE ON PRIOR LAW IS NOT NECESSARY TO SHOW IMPERMISSIBLE RETROACTIVE EFFECT OF A NEW LAW

To date, much of the existing case law which has developed concerning the retroactive application of AEDPA and IIRIRA to lawful permanent residents convicted of committing deportable offenses prior to the new law, has centered on the timing of the initiating of certain proceedings by INS and the Office Of The Immigration Judge (EOIR), and/or the reliance by the alien on the existance of his/her eligibility for 212 (c) relief from deportation -- at the time that the individual pleaded guilty to a conviction based on conduct that occurred prior to April 24, 1996 Mattis v. Reno 2000 U.S. App. First Circuit Lexis 9152 May 8, 2000. It has been suggested that many lawful permanent residents in criminal proceedings often reasonably relied on general and specific knowledge about the availability of relief from deportation when they plead guilty to deportable offenses. Such reasonable reliance on prior law informs and guides the determination of whether a new law has retroactive effect. See Landgraf , 511 U.S. at 270 (" Familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance").

Nevertheless, Supreme Court case law is clear that persons need not show actual individual reliance before they can avoid the adverse consequences of a retroactive application of a new law

where Congress did not expressly provide for such retroactive application. What matters is simply "whether the new provision attaches new legal consequences to events completed before its enactment." Martin v. Hadix, 119 S.Ct. at 1998 (quoting Landgraf, 511 U.S. at 269-270); see also Tasios v. INS, 2000 WL 22333, at *6 (4th Cir. Feb. 28, 2000) ("When the legal effect of conduct is determined by subsequently enacted law, that law operates retroactively."). Thus, in Landgraf and other cases where the Supreme Court has analyzed whether a new civil statute has impermissible retroactive effect, the essential question is not whether the person expressly relied on a given understanding of the law, but whether applying the new law to past events changes the consequences of the relevant conduct. See Hughes Aircraft, 520 U.S. 939 (finding retroactive effect when a private party lost a defense against private suits for submitting a false claim to the government, even though the private party never had such a defense against a government suit and there was no showing that the party relied on the government failing to pursue a suit); Landgraf, 521 U.S. 244 (finding retroactive effect of new punitive and compensatory damages and jury trial provisions of the Civil Rights Act of 1991 in a suit for sexual harassment where the conduct pre-dated the amendments, even though the conduct had always been wrongful and there was no evidence of reliance or prior law). The Landgraf Court noted that "even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." Id. at 283, n.35.

Petitioner-appellant did not plead guilty to his 1993 conviction but was found guilty by a jury of six. Petitioner-appellant entered into serious plea negotiations. Compromis e dispositions were discussed by and between Petitioner-appellant's criminal counsel and the prosecuting District Attorney for the Commonwealth of Massachusetts. It is well-established that the majority of criminal cases in the District Courts of the Commonwealth of Massachusetts are resolved through a "plea". Petitionerappellant opted to exercise his right to a jury trial, a fundamental Constitutional right. He chose to discontinue plea negotiations which would have given rise to a disposition through that would not have created an immigration consequence, in'favor of ajury trial because he believed in his innocence and also reasonably relied on general and specific

knowledge about the availability of relief from deportation (Pre-AEDPA INA 212(c)) should he be convicted at trial. This scenario as presented in Petitionerappellant's case is not uncommon, is pivotal to his claims before this Court and has not been properly addressed by any Federal Circuit Court of Appeals to date. Furthermore, pursuant to Massachusetts General Laws Ch. 278 Sec. 29D, an individual who exercises his right to a jury trial is not required to be informed of the immigration consequences of the conviction that could returned by a jury or a trier of fact, while an individual who pleads guilty is required to be informed by the presiding judge that the conviction flowing from the tendered plea may have the consequence of deportation, denial of naturalization, or exclusion upon seeking re-rentry to the United States M. G. L. Ch. 278 Sec. 29D.

The applicable Federal case law to date has completely ignored these individuals who exercise their rights to a jury trial and forgo a disposition through plea. At the very least, these individuals should be given the opportunity to show that they relied on the availability of relief from deportation (Pre-AEDPA INA 212(c)) when they opted to exercise their right to a jury trial and not enter a plea as did Petitioner-appellant and do the majority of defendants in the District Courts of Massachusetts. Such a ruling by this Court would put Petitionerappellant on an equal footing with those aliens who pleaded guilty prior to April 24, 1996.

The existence of "reliance" as mentioned above is a question of fact for a judge or a trier of fact to determine. The determination will require time and testimony and the proper exercise of discretion - an imperfect process. Conversely, were this Court to simply set upon the date of conviction or the date of criminal conduct to determine those rights and privileges which inure to aliens, there could be no mistake. Immigration Judges would simply look to the laws in place on the operative date and employ them. This is not only logical but a result contemplated in LandgLaf.

Supreme Court decisions applying the Ex Post Facto clause also recognize that new laws have impermissible retroactive effect when they change the legal consequences of past conduct, regardless of whether actual reliance on prior law can be demonstrated. These decisions specifically recognize the retroactive effect of a change from a discretionary penalty system to a system

of mandatory penalties. Carmel v. Texas, No. 98-7540, 120 S.Ct. 1620 (May 1, 2000) (Holds that a showing of reliance is not necessary for a statute to have a genuinely retroactive effect); United States v. Johnson, No. 99-5153, 120 S.Ct. 1795 (May 15, 2000) (recognizes the interrelationship of Ex Post Facto case law in the criminal context and statutory analysis in the civil context); Lindsay v. Washington 301 U.S. 397 (1937) (Court held that a statute changing a maximum sentence to a mandatory sentence for offense committed prior to the statute's enactment is an impermissible ex post facto law); Warden, Lewisburg Penitenflaa v. Marrero, 417 U.S. 653, 663 (1947) (Court indicated that a statute taking away parole eligibility for offenses subject to parole according to the law at the time they were committed was impermissible as an ex post facto law); see also Tasios, 2000 WL 22333, at *7 ("As cases decided under the Ex Post Facto Clause establish, any change of outcomes is retroactive."). These decisions do not require a showing of reliance on prior law from the individual seeking to demonstrate the retroactive effect of a new law.

Although the Ex Post facto clause's retroactivity prohibitions are limited to criminal legislation, the Court often relies on Ex Post Facto case law to determine whether civil laws have "retroactive effect." See, e.g., Hughes Aircraft, 520 U.S. at 948 (citing Collins v. Youngblood, 497 U.S. 376 (1990) and Beazell v. Ohio, 269 U.S. 167 (1925) ; Landgraf, 511 U.S. at 269, n.23 (citing Miller v. Florida, 482 U.S. 423 (1987).

What the Supreme Court's retroactivity decisions recognize, in both the civil and criminal contexts, is that people have a right to know the possible legal consequences of their actions at the time of their conduct, whether or not they will later be able to demonstrate actual individual reliance on that knowledge. It would be contrary to our system of justice, not to mention largely unfeasible and tremendously burdensome, for persons to have to show actual individual reliance on prior law before they can avoid the adverse consequences of application of a new law to pre-Act conduct. Rather, in our system of justice, it is presumed that a person acts in conformity with the law at the time of his or her actions.

Pena-Rosario v. Reno, 2000 WL 150710, *16 (E.D.N.Y. 2000) (quoting from Maria v. McElroy, 68 F. Supp. 2d 206,229 (E.D.N.Y., 1999)).

Here, the government's application of AEDPA and IIRIRA to lawful permanent residents convicted of committing deportable offenses prior to the new law unquestionably eliminates a legal right -- eligibility for 212 (c) relief from deportation based on conduct that occurred in the past. Under prior law, long-time lawful permanent residents with criminal convictions faced possible, but not certain, deportation due to eligibility to seek 212 (c) relief. However, if AEDPA and IIRIRA are applied to them, their statutory right to seek 212 (c) relief is taken away and deportation becomes virtually inevitable. Thus, for such lawful permanent residents, the government's position changes a mere possibility of deportation into a certainty of deportation. Based on the Supreme Court's retroactivity jurisprudence, in the absence of clear statement of retroactive legislative intent, such retroactive effect is preemptively impermissible.

Court decisions that found that previous restrictions on 212 (c) relief enacted by Congress in 1990 were not impermissible retroactive, e.g., DeOsorio v. INS. 10 F. 3d 1034 (4th Cir. 1993), pre-dated the recent Supreme court retroactivity decisions. The Fourth Circuit itself recently concluded that the Supreme Court's 1997 decision in Huges Aircraft undermined its analysis in DeOsorio, and dictated a contrary result. Tasios, 2000 WL 223333, at *6 ("In light of [the]recent guidance from the Supreme Court, we conclude that the observations made in DeOsorio do not account for the essential retroactive consequences of removing the availability of 212 (c) relief."); see also Mayers v. INS, 175 F.3d 1289, 1303 (1 Ith Cir. 1999) ("Prior to the passage of AEDPA, the appellees had a statutory right to apply for a section 212 (c) waiver. To prohibit them from making such an application now arguably 'attaches a new disability' and imposes additional burdens on past conduct."), Henderson v. INS, 157 F.3d 106, 129 (2d Cir. 1998) ("Application of this presumption would require us to consider whether the statute before us [AEDPA Section 440 (d)] is genuinely retroactive. We are inclined to believe that it is."); Goncalves, 144 F. 3d at 128 ("The Attorney General's application of the new AEDPA restrictions takes away a form of relief that, while discretionary, is plainly substantive, and so implicates Landgraf s presumption against retroactivity").

F. RETROACTIVE APPLICATION OF AEDPA WOULD OFFEND, PUBLIC POLICY

In considering whether the Petitioner-appellant is eligible for relief from deportation under section 212(c) of the Act, the Court must consider the ramifications of declining to grant the petitioner's request. The Immigration and Naturalization Service's failure to serve the petitioner an Order to Show Cause prior to, April 24, 1996, affected his substantive rights to apply for relief from deportation. Additionally, the Immigration and Naturalization Service has the option, under both the Act and the implementing regulations, to terminate deportation proceedings and serve the alien a Notice to Appear, thus commencing removal proceedings. By attaching substantive immigration statutory rights to the actions of the Immigration and Naturalization Service (INS), the INS would wield wide latitude in determining who would be targeted for deportation. Essentially, the Immigration and Naturalization Service would hold the unfettered power to adjudicate the alien's ability to apply for relief from removal, something clearly not articulated by Congress, in light of the creation of the exclusive authority of the Immigration Judge to adjudicate admissibility, removability and waivers therefrom.

A true and accurate interpretation by this Court of the statutes before it, while at the same time interpreting the Constitution with the Supreme Court's precedent, permits this Court to determine that the United States District Court For The Dis o tr16f Of Massachusetts can exercise subject matter jurisdiction over the claims and requests of Petitioner-appellant.

In the interests of fundamental fairness, venue is properly found in the United States District Court for the District of Massachusetts. Alternatively, should this Court determine that Alvarez is of "precedential value", it can determine that Petitioner-appellant's circumstances are and were "exceptional", this permitting the United States District Court For The District Of Massachusetts to be the proper forum to hear his habeas petition.

Mr. Vasquez, Petitioner-appellant, is a 27-year-old native of the Dominican Republic who entered the United States as an immigrant at the age of 15, in 1987 and should be eligible to apply for Section 212(c). Through no fault of Mr. Vasquez, he was not placed in proceedings before the immigration judge until

long after Section 212(c) had been abolished in April of 1996. The action of the INS in waiting five and six years after the dates of his relevant convictions to institute proceedings against Mr. Vasquez, was either arbitrary or specifically intended to take away his only real opportunity to retain his status as a legal permanent resident. Regardless of the motivation for the delay of the INS, Mr. Vasquez should not incur an additional disability as a consequence of the INS' lack of action in a judicially responsible time frame. In light of the INS inaction, this Court must determine that the rights, privileges and disabilities which inured to Mr. Vasquez on the date of his convictions should stay with him regardless of the timing of the INS decision to institute immigration proceedings against him. The Order To Show Cause which should have been served upon him before April 24, 1996, was not simply a prosecutorial document but also a document that would have conferred upon Mr. Vasquez the capability to apply for relief from deportation pursuant to Section 212(c).

All of Mr. Vasquez' criminal conduct and criminal convictions, took place before the enactment of the Anti-terrorism And Effective Death Penalty Act Of 1996, Pub. L. No. 104-13 2. 110 Stat. 1213, 1277 ("AEDPA"), which was signed into law on April 24, 1996. The conviction which eventually caused Mr. Vasquez to be issued a final Order Of Removal is a 1993 "theft" conviction in Newburyport District Court in Massachusetts, which entered as a consequence of a guilty finding by a jury of six.

In Goncalves v. Reno, 144 F.3d 110, (Ist Cir,. 1998), cert. denied, 119 S. Ct. 11409 67 U.S.L.W. 3555 (March 8,1999), this Court determined that Congress did not intend AEDPA Section 440(d) to apply retroactively to applications for 212(c) waiver relief pending before April 24, 1996. In Wallace v. Reno, et al. st Circuit Ct. Appeals, 98-2317 (October 26,1999), the First Circuit went further and stated, "Our decision leaves open the question whether and when AEDPA Section 440(d) 's new ban on waivers applies to cases in which the alien plead guilty to the crime before AEDPA's enactment Id. In Mattis v. Reno, 2000 U.S. App. First Circuit, Lexis 9152 (May 8, 2000), this Court recognized the reliance theory but only for aliens who plead guilty before April 24, 1996, in reliance on the existance of their capabilty to apply for a 212(c) waiver. This Court also stated that in order to raise this argument in the Federal Courts, the alien must have submitted evidence of

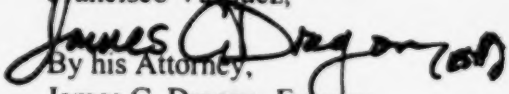
reliance to the immigration judge during the immigration proceedings. This posture requires an unrealistic foresight on the part of immigration attorneys and pro se respondents, who were routinely degraded by immigration judges at the mere suggestion that the alien was entitled to a 212(c) waiver after April 24, 1996.

When applying the AEDPA Section 440(d) ban on 212(c) waivers, there is no logical or Constitutionally permissible reason to distinguish those individuals who plead guilty from those individuals who exercised their right to a jury trial. Mr. Vasquez decided not to enter into a plea agreement as he believed in his innocence and believed that, should he be convicted after trial, he would be eligible to apply for a Section 212(c) waiver. Accordingly, at the very least, Mr. Vasquez must be given the opportunity to present evidence of his reliance on the existance of a Section 212(c) waiver when he chose not to enter into a plea agreement but rather to pursue his innocence before a jury of six.

CONCLUSION

For all the reasons set forth herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,
Francisco Vasquez,



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CERTIFICATE OF COMPLIANCE

I, James C. Dragon, Esquire, the undersigned Counsel for Petitioner -appellant Francisco Vasquez, pursuant to Rule 32 of the Federal Rules Of Appellate Procedure, do hereby certify that the foregoing Petitionerappellant's Brief, uses a proportionately spaced typeface, no more than 30 pages in length, roman font employing (11) points.

James C. Dragon, Esq.

March 8, 2001

CERTIFICATE OF SERVICE

I, James C. Dragon, Esquire, the undersigned Counsel for Petitioner--appellant Francisco Vasquez, do hereby certify that I have, this day, caused the foregoing: Petitition for Writ of Certiorari , to be forwarded by first class mail, pre-paid, to Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530-0001.

March 8, 2001

James C. Dragon, Esq.

DECISION APPENDIX

FRANCISCO VASQUEZ, Petitioner v. JANET RENO, Attorney General; DORIS MEISSNER, Commissioner of the Immigration and Naturalization Service STEVEN J. FARQUHARSON, District Director of Immigration and Naturalization Service, Respondents

CIVIL ACTION No. 00-10657-WGY

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

97 F. Supp. 2d 142; 2000 U.S. Dist. LEXIS 6530

April 21, 2000, Decided

DISPOSITION:
[**1] Petition for habeas dismissed.

COUNSEL:
For FRANCISCO VASQUEZ, Petitioner: James C. Dragon, Lowell, MA.

For JANET RENO, DORIS MEISSNER, U.S. DEPT. OF JUSTIC, STEVEN J. FARQUHARSON,
Respondents: Frank Crowley, Immigration & Naturalization, Special Assistant US Attorney, Boston, MA.

JUDGES:
WILLIAM G. YOUNG, CHIEF JUDGE.

OPINIONBY:
WILLIAM G. YOUNG

OPINION:

[*144]

MEMORANDUM

YOUNG, C.J.

April 21, 2000

I. Introduction

The Petitioner, Francisco Vasquez ("Vasquez") petitioned this Court for a Writ of Habeas Corpus pursuant to *28 U.S.C § 2241*, claiming that he is being unlawfully detained by the government in violation of the laws of the United States. The government moved to dismiss the petition pursuant to Fed. R. Civ. P. 12(b)(6) for lack of subject matter jurisdiction, lack of personal jurisdiction, and improper venue.

On April 18, 2000, the Court heard oral arguments on both the procedural bars and the merits of the petition. At that time the Court ruled that it has both subject matter and personal jurisdiction and that venue properly lies in the District of Massachusetts. At the conclusion of the hearing, however, the Court dismissed the petition on the merits. [**2] Here follows a summary of the Court's reasoning.

II. Factual and Procedural Background

Vasquez is a twenty-seven year old native and citizen of the Dominican Republic who was admitted as a lawful, permanent resident on January 15, 1987. On October 21, 1993, Vasquez was convicted in Massachusetts for receiving stolen property. He

served six months of an eighteen-month sentence. Based on this conviction, removal proceedings were brought against Vasquez by an Order to Show Cause dated February 2, 1999. n1 He was originally detained in Massachusetts but within days of his arrest he was transferred to the Federal Detention Center in Oakdale, Louisiana. It was there that the removal proceedings and subsequent appeals took place. Because he met the statutory definition of an "aggravated felon," he was ordered removed to the Dominican Republic on September 27, 1999 pursuant to *8 U.S.C. § 1227*(a)(2)(A)(iii). Through his attorney, Vasquez filed the necessary appeals which were denied on March 6, 2000. n2 He was **[*145]** scheduled for removal on April 5, 2000 and filed an emergency stay of deportation and habeas petition in this district on April 4, 2000.

n1 The Immigration and Naturalization Service originally brought removal proceedings based on a 1994 controlled substance conviction. After commencement of the initial removal proceedings, however, petitioner mounted a collateral attack in the state courts and, as so frequently happens when the federal consequence of a state conviction becomes apparent, the Massachusetts District Court vacated the conviction. New removal charges were brought against Vasquez based on his 1993 conviction. **[**3]**

n2 It is unclear from the record whether Vasquez formerly asked the Bureau of Immigration Appeals ("BIA") for a discretionary waiver pursuant to former section 212(c) of the Immigration and Naturalization Act. Given the current state of the law, however, it is evident that BIA would have considered Vasquez ineligible for relief.

The Court granted the stay and heard initial oral arguments on April 5, 2000. At that time the government disputed this Court's subject matter jurisdiction to hear the petition as well as claiming lack of

personal jurisdiction over the custodian and improper venue. Because of the unsettled law in this area, the Court took the matter under advisement and sought additional oral argument on April 18, 2000.

Vasquez's habeas petition contends that he is eligible for section 212(c) discretionary relief. Prior to the enactment of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), aliens facing **[**4]** exclusion or deportation could seek a discretionary waiver from the Attorney General. Although an alien had no legal right to stay in the country, he was entitled to apply for a waiver and ask the Attorney General, in the exercise of her discretion, to allow him to remain here. In 1996, the availability of discretionary waivers was eliminated for individuals who, like Vasquez, had committed certain crimes. See IRRIRA § 304(b). n3 The retroactive application of this provision to individuals embroiled in deportation proceedings prior to the effective dates of the amendments has been resolved in this circuit. See *Wallace v. Reno, 194 F.3d 279 (1st Cir. 1999); Goncalves v. Reno, 144 F.3d 110 (1st Cir. 1998)*. What remains unresolved by circuit precedent is whether the amendments prevent an alien, convicted of a crime prior to 1996 yet not involved in removal proceedings until after April 1, 1997, from seeking discretionary relief.

n3 Effective April 1, 1997, INA section 212(c) was repealed in its entirety by section 304(b) of IRRIRA. It was replaced with another discretionary relief provision, INA section 240A, codified at *8 U.S.C. § 1229*(b). That section grants the Attorney General discretion to cancel removal in certain circumstances, but not when the alien has been convicted of an aggravated felony.

[5]**

While the merits of this case present complex and serious questions, it is the procedural issues that are at the center of this dispute. In enacting AEDPA

and IIRIRA, Congress severely restricted the judicial review available for aliens ordered removed and may have extinguished such review altogether in the district courts. See *8 U.S.C. § 1252*. The extent of the restriction is the source of significant controversy in the courts. The government has prepared a gauntlet of jurisdictional traps through which a petitioner must run prior to having the merits of his claim heard. In the case at bar, the government contends that *8 U.S.C. § 1252* effectively repealed a district court's habeas jurisdiction and channeled all challenges to removal orders to the courts of appeals. Thus, before this Court can reach the merits, the procedural issues must be addressed.

III. Discussion

A. Subject Matter Jurisdiction

1. Was it Repealed?

The first question that must be addressed is one that has plagued the judiciary since the inception of AEDPA and IIRIRA -- whether this Court has subject matter jurisdiction to hear this habeas petition. **[**6]** The government contends that the judicial review process provided for by the permanent rules in *8 U.S.C. § 1252* effectively repealed a district court's habeas review pursuant to *28 U.S.C. § 2241*. This is an argument that has met with success in two circuits, see *Max-George v. Reno, 205 F.3d 194, 2000 WL 220502*, at *2 (5th Cir. 2000); *Richardson v. Reno, 180 F.3d 1311, 1313 (11th Cir. 1999)*, but has been rejected by a third. See *Liang v. Immigration & Naturalization* **[*146]** *Service, 206 F.3d 308, 2000 WL 264216*, at *7 (3d Cir. 2000) (Sloviter, J.). The First Circuit Court of Appeals has yet to address this difficult issue directly.

The Fifth and Eleventh Circuits held that the permanent rules eliminated habeas jurisdiction in the district courts and funneled all review into the courts of appeals. Both courts relied on the Supreme Court's decision in American-Arab to rule that section 1252[b][9] was an "'unmistakable zipper clause' that 'channels judicial review' of INS 'decisions and actions' exclusively into the judicial review provided by INA." **[**7]** *Richardson, 180 F.3d at 1315;* see *Max-George, 2000 WL 220502*, at *4 (section 1252(b)(9) "clearly mandates" review limited to what is provided in section 1252). The

Fifth Circuit went on to conclude that the "notwithstanding any other provision of law" phrase in section 1252(a)(2)(C) "clearly precludes habeas jurisdiction under *28 U.S.C. § 2241*." *Max-George, 2000 WL 220502*, at *4. Thus, district courts in the Fifth and Eleventh Circuit no longer have jurisdiction to hear any matter regarding the removal of aliens. Jurisdiction is exclusively in the courts of appeals, or in certain instances no review is available in any court. See *8 U.S.C. § 1252*(a)(2)(C) (providing "no court shall have jurisdiction to hear any final order of removal" in prescribed situations).

The Third Circuit viewed the reasoning and outcome in Richardson and Max-George as contrary to the dictates of the Supreme Court in *Felker v. Turpin, 518 U.S. 651, 135 L. Ed. 2d 827, 116 S. Ct. 2333 (1996)*. See *Liang, 2000 WL 264216*, at *11. Although the government urged the Liang **[**8]** court to adopt the reasoning from the Fifth and Eleventh Circuits, the court refused, see id., instead stating, "we continue to believe that had Congress intended to eliminate habeas jurisdiction under § 2241, it would have done so by making its intent explicit in the language of the statute." Id. In so concluding, the court sought to avoid the "serious constitutional problems that would arise" if it were to adhere to its previous determination that section 1252(a)(2)(C) stripped the appeals court of jurisdiction over petitions for review by aliens with certain criminal convictions and then read the permanent rules to strip the district courts of habeas jurisdiction as well. See id.

While the First Circuit Court of Appeals has not ruled on subject matter jurisdiction under the permanent rules, at least one judge of the Massachusetts District Court has faced the unenviable task of aivining congressional intent regarding the existence and scope of district court jurisdiction. See *Carranza v. Immigration & Naturalization Serv., 89 F. Supp. 2d 91, 2000 WL 246488*, at *3 (D. Mass. 2000). In Carranza, Judge Keeton held that the jurisdictional limits **[**9]** stated in AEDPA and IIRIRA severely restricted 'a district ' court's habeas review. See id. Specifically, he ruled that "insofar as Carranza is asking this court to review a final removal order, the basis of which is the BIA's determination of the inapplicability of

discretionary relief under [section 212(c)], ... both the [AEDPA] and [IIRIRA] have amended the [INA] to divest this court of jurisdiction." Id. To the extent that Carranza was seeking habeas review of his underlying criminal conviction, however, the court concluded that it had jurisdiction "to consider 'fundamental constitutional questions.'" Id.; see also *Mahadeo v. Reno, 52 F. Supp. 2d 203, 204 (D.Mass. 1999)* (Stearns, J.) (agreeing with Judge Keeton's analysis, under the transitional rules, that district courts do not retain residual habeas jurisdiction under section 2241). It is unclear whether Judge Keeton viewed AEDPA and IIRIRA as effectively repealing the statutory habeas jurisdiction and leaving available only the constitutional writ.

Although the First Circuit has not dealt with the issue of habeas jurisdiction under the permanent rules, it has addressed an identical question under **[**10]** the transitional rules. See *Wallace v. Reno, 194 F.3d 279 (1st Cir. 1999); Goncalves v. Reno, 144 F.3d 110 (1st Cir. 1998).* The reasoning **[*147]** employed in both cases parallels the reasoning adopted by the Third Circuit in Liang. In Goncalves, the court relied on Felker to conclude "there is no question that unless it has been expressly repealed, § 2241 provides a basis for reviewing immigration decisions." *144 F.3d at 120.* According to the court, Felker and *Ex parte Yerger, 75 U.S. (8 Wall.) 85, 19 L. Ed. 332 (1868),* adopted a general rule "that any repeal of the federal court's historic habeas jurisdiction ... must be explicit and make express reference specifically to the statute granting jurisdiction." Id.

In Wallace the First Circuit faced the question of whether the recent Supreme Court decision in American-Arab undermined its holding in Goncalves and concluded it did not. See *194 F.3d at 283.* In its opinion the court considered the government's argument that the new immigration statutes, read together, "should be treated as an implied prohibition on habeas as to deportations **[**11]** in general." *Id. at 284.* While the court admitted "this is by no means a silly argument" and recognized that "concentrating all judicial scrutiny of deportation in the courts of appeal is certainly the general direction in which Congress has been moving," it declined to adopt such a comprehensive restriction on habeas review. Id.

Instead it held that, under the transitional rules, deportees could challenge their removal orders through habeas "where they have no other way to assert in court that their deportation is contrary to the Constitution and laws of the United States." *Id. at 285.*

While the facts of Goncalves and Wallace were limited to review under the transitional rules, the reasoning is equally applicable to review under the permanent rules. Supreme Court precedent dictates that if Congress is going to restrict habeas review, it must do so explicitly. See *Felker, 518 U.S. at 659.* The First Circuit applied this binding precedent in Goncalves and concluded that, absent explicit reference to section 2241, habeas jurisdiction survived. See *144 F.3d at 120.* Neither the transitional rules nor the **[**12]** permanent rules contain an explicit repeal of section 2241. Thus, precedent compels this Court to conclude that habeas jurisdiction remains.

This conclusion is strengthened by the fact that absent review at the district court level Vasquez would "have no forum at all for the review of statutory claims" because he is deportable based upon his criminal convictions pursuant to section 1227(a)(2)(A)(iii). *Wallace, 194 F.3d at 285.* Section 1252(a)(2)(C) provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in ... 1227(a)(2)(A)(iii)." Under the facts of this case, Vasquez is unable to obtain review of his claim in a court of appeals. The First Circuit found the absence of any review untenable under the transitional rules. See *Wallace, 194 F.3d at 285.*

The lack of available review under the permanent rules in Liang, was a compelling factor in ruling that habeas jurisdiction survived the enactment of AEDPA and IIRIRA. See *2000 WL 264216,* at *13. There, the government argued that section 1252(a)(2)(C) did not eliminate **[**13]** all review by courts of appeals rather it limited review to whether a petitioner "(1) [is] an alien, (2) is removable, and (3) is removable by reason of having a statutory crime ...." Id. The Third Circuit was unimpressed and unpersuaded by this reasoning because it still left petitioner's constitutional and statutory claims unreviewable. Id. This reasoning is consistent with that employed

by the First Circuit in Wallace when it concluded that section 1252(a)(2)(C) leaves no forum open for review of statutory claims by anyone deported because of a covered conviction. See *194 F.3d at 285.* "This argument must fail because of the absence of any support, either in the statute or the legislative history. The government's briefs cite no provisions of AEDPA or IIRIRA that supports its reading ... and it conceded at **[*148]** oral argument that there is no specific provision granting us jurisdiction over substantial constitutional claims." *Liang, 2000 WL 264216,* at *13.

This Court is persuaded by the Third Circuit's decision in Liang. Moreover, given the First Circuit's reasoning in Goncalves and Wallace and absent explicit reference **[**14]** to *28 U.S.C. § 2241* this Court rules that AEDPA and IIRIRA did not repeal a district court's habeas jurisdiction. This conclusion is bolstered by the fact that if habeas was unavailable, then Vasquez would be without judicial review in any forum.

2. What is the Scope of Available Review?

While habeas jurisdiction remains intact, a question still exists regarding the scope of review available. The First Circuit discussed this issue under the transitional rules in Goncalves. See *144 F.3d at 123.* The court determined that habeas included the review of statutory claims, but "[left] to future cases the task of defining the precise limit of jurisdiction under *28 U.S.C. § 2241* in immigration cases." *Id. at 125.* Implicit in this statement is the recognition that some limit does exist. As of yet, the exact parameters of habeas jurisdiction is undefined.

Several district courts have wrestled with this issue. In *Mendonca v. Immigration & Naturalization Serv., 52 F. Supp. 2d 155 (D. Mass. 1999),* Judge Saris, under the transitional rules, declined to accept jurisdiction to review a discretionary **[**15]** decision by an immigration judge. See *id. at 162.* She distinguished the case before her from the facts of Goncalves because Goncalves' application for discretionary relief was never heard. See id. Based on this distinction and "given the sweeping language of IIRIRA's judicial review provisions and the conviction of many courts that Congress intended the new immigration laws to narrow significantly the scope of federal courts' review of INS deportation decisions"

she declined to review the decision. Id.

The case went up on appeal, and in a one-page, unpublished opinion n4 the First Circuit abstained from further defining the scope of habeas review. See *Mendonca v. Immigration & Naturalization Serv., 1999 U.S. App. LEXIS 34427, 1999 WL 1295834*, at *1 (1st Cir. Dec. 30, 1999) (unpublished opinion).

In turn, whether federal courts in such "transitional rules" cases possess residual jurisdiction under § 2241 to review discretionary determinations of the BIA is a question not subject to ready resolution. However, the question how far habeas jurisdiction extends is one of great practical importance, and there is no reason to address it in this case. Even assuming **[**16]** that habeas jurisdiction does extend in this matter to abuses of discretion -- and this is very much an arguendo assumption -- there is nothing in this case that remotely suggests such an abuse by BIA. Accordingly, whatever the scope of habeas corpus, there is no basis for setting aside the BIA's refusal to adjust status. Id.

n4 While without precedential value, see 1st Cir. R. 36, it is a virtual necessity to refer to unpublished First Circuit decisions to attempt to make sense of this rapidly evolving area of the law. For a full discussion of the propriety of making such reference and the weight to be accorded to such decisions, see *Giese v. Pierce Chem. Co., 43 F. Supp. 2d 98, 104 n.1 (D. Mass. 1999)*.

Judge Keeton, in Carranza, described the scope of habeas review under the permanent rules as "newly restricted." *2000 WL 246488*, at *3. According to his analysis, review was limited to "'fundamental constitutional questions' concerning the underlying conviction. **[**17]** " Id. Because the petitioner was claiming that his counsel for the underlying conviction was constitutionally ineffective, the court determined that it had jurisdiction. See id.

It is unclear how Judge Keeton drew the jurisdiction line. His limitation of habeas **[*149]** to "fundamental constitutional questions" seems to me to give insufficient weight to the First Circuit's conclusion in Goncalves that habeas review

extended to consideration of the BIA's refusal to consider a deportee for discretionary relief in violation of a statute. See *144 F.3d at 125.* Although the decision in Goncalves was made under the transitional rules, the analysis regarding the scope of review did not rely on the statutory language of the amendments. Instead the court examined the language of habeas statute. n5 See *id. at 123.* In so doing it concluded that "the language of § 2241 itself does not contemplate a limitation of jurisdiction only to constitutional claims; instead, it contemplates challenges based on the 'Constitution or laws or treaties of the United States.'" Id. Thus, it was within the jurisdiction of the Goncalves court to determine if the retroactive **[**18]** application of the new statute was correct.

> n5 The examination of the language of the habeas statute follows logically from the analysis regarding whether the statute was repealed. A direct consequence of determining that the statute remains intact is that the language of the statute still has full effect absent a specific legislative mandate to the contrary.

Based on the First Circuit's reasoning in Goncalves, this Court must respectfully disagree with Judge Keeton's conclusion in Carranza. It is the position of this Court that it has jurisdiction to hear "pure issues of law concerning the applicability of [certain of the new] statutory provisions" to individuals who committed their crimes prior to the enactment of the statute. *Goncalves, 144 F.3d at 133.* Thus, habeas review includes a determination of whether section 212(c) relief is available to Vasquez.

B. Personal Jurisdiction

Even if this Court has subject matter jurisdiction, it may not have personal jurisdiction. Not surprisingly, **[**19]** this is the argument advanced by the government. The government contends that Vasquez's custodian is the INS District Director in Louisiana and consequently this Court does not have personal jurisdiction over him. Vasquez counters that the Attorney General is his custodian, not the INS District Director in Louisiana, and as such personal

jurisdiction lies in this district. n6

> n6 Vasquez also includes Meissner and Farquharson as potential custodians. It is, however, only necessary here to address the question of whether the Attorney General is subject to personal jurisdiction.

On this point too there is as yet limited guidance from the First Circuit. In another unpublished opinion, the First Circuit declined to decide the issue of personal jurisdiction under a similar set of facts. See Alvarez v. Reno, No. 98-1099, slip op. (1st Cir. Feb. 6, 1998) (unpublished opinion). A review of the scant case law on this question indicates that, as in the area of subject matter jurisdiction, there is significant disagreement **[**20]** among the lower courts.

The gravamen of the dispute centers on the definition of custodian in the instance of an alien, taken into custody in Massachusetts by the INS and subsequently transported to Louisiana for deportation proceedings. The fact that Vasquez is not currently in Massachusetts does not determine the appropriate custodian. In *Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (1973),* the Supreme Court determined that nothing in the habeas statute required the petitioner to be detained within the reviewing court's territorial jurisdiction. See *id. at 495.* According to Braden, "the language of § 2241 requires nothing more than that the court issuing the writ have jurisdiction over the custodian." Id. Thus, the fact that Vasquez is detained in Louisiana does not preclude this Court from having personal jurisdiction over his custodian. Braden does not, however, determine exactly who is the custodian.

The government argues that the traditional notion of "custodian" in habeas cases **[*150]** means the person having day-to-day control over the individual. See *Yi v. Maugans, 24 F.3d 500, 507 (3d Cir. 1994).* **[**21]** Generally, that person is the warden of the prison where the detainee is held. Consequently, according to the government, the INS Director in New Orleans, who has control over the aliens detained by the INS in Louisiana is the "custodian" for purposes of this

case. All the cases cited by the government to support its position, however, occurred in the context of federal prisoners challenging their sentences, save one. In Yi v. Maugans, the petitioner attempted to obtain class certification for all Chinese aliens in exclusion proceedings. See *24 F.3d at 507.* Class certification was denied for a variety of reasons, one being that the district court lacked jurisdiction over many of the class members and their custodians. See id. Neither the parties nor the court raised the issue of whether the correct custodian was named as respondent. Thus, at best, this case is inapposite.

There are a trifecta of cases from the Eastern District of New York that directly address the issue of personal jurisdiction in this context. This Court finds these cases persuasive. See *Pena-Rosario v. Reno, 83 F. Supp. 2d 349 (E.D.N.Y. 2000); Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y. 1997);* **[**22]** *Nwankwo v. Reno, 828 F. Supp. 171 (E.D.N.Y. 1993);* see also *Yesil v. Reno, 958 F. Supp. 828 (S.D.N.Y 1997).* Each of these decisions ruled that the Attorney General was an appropriate custodian "because she could 'direct her subordinates to carry out any order directed to her to produce or release the petitioner.'" *Mojica, 970 F. Supp. at 166* (quoting *Nwankwo, 828 F. Supp. at 174).* The reasoning is supported by the language of the Warrant of Removal/Deportation which provides "I, the undersigned officer of the United States, by the virtue of the power and authority vested in the Attorney General under the laws of the United States and by his or her direction, command you to take into custody and remove from the United States ...." Resp. Reply Mem. Ex. B. Based on the language chosen by the INS, it is not unreasonable to infer that the Attorney General is the custodian.

The New York decisions also relied on the potential implications of the Attorney General's ability to choose the jurisdiction. "It is important to note that were the government correct that a habeas petition may be heard only where the petitioner **[**23]** is detained, then the Attorney General 'could seriously undermine the remedy of habeas corpus by detaining a large group of persons in one facility so that the resulting torrent of habeas corpus petitions would overwhelm' the local court." *Mojica, 970 F. Supp. at 167* (quoting *Nwankwo, 828 F. Supp. at 175).* Although

it is unlikely that the Attorney General acts with such a sinister intent, the potential effect of her decision relative to detention sites makes this supposition far from ridiculous. According to the Fifth Circuit, "the district and magistrate judges are toiling long and hard to process the torrent of habeas petitions flowing from the Oakdale facility," however, "the atypical and unanticipated volume ... is beyond the capability of the district court to process in a timely fashion." *Emejulu v. Immigration and Naturalization Serv., 989 F.2d 771, 772 (5th Cir. 1993).* Thus, practical issues of judicial economy and notions of justice also counsel that the Attorney General is the appropriate custodian.

In so ruling, this Court again respectfully acknowledges its disagreement with Judge Keeton. In an unpublished order, Judge **[**24]** Keeton explicitly stated that the New York decisions were "mistaken as a matter of law and policy." Resp. Supp. Mem. Ex. B. The court went on to state that "the idea that an alien could file willy-nilly in any judicial district in the United States of his choosing would wreak havoc on the orderly administration of the immigration laws." Id. This Court must respectfully disagree. Establishing that the Attorney General is the custodian of the petitioner does not give detainees carte **[*151]** blanche to file anywhere. A venue analysis would quickly disarm any potential abuses of the system. Moreover, it is impractical for a detainee to petition courts with which she has no connections. The facts in the New York cases and the facts before this Court indicate that all the petitioners had significant ties to their home communities. Thus, it is unlikely that the personal jurisdiction analysis adopted today will "wreak havoc on the orderly administration of the immigration laws."

Because the Attorney General is the custodian of Vasquez and is subject to service in the District of Massachusetts, this Court has personal jurisdiction. See *Braden, 410 U.S. at 495.*

C. Venue **[**25]**

The government is not yet out of procedural ammunition; it also asserts that the District of Massachusetts is not the appropriate venue for this matter. This is a compelling argument yet, like the questions of jurisdiction, it lacks substantive definition from the courts of appeals.

Venue refers to locality, the place where a lawsuit should be heard. It is often confused or combined with personal jurisdiction. They are two distinct concepts, however. The Supreme Court explained the difference in *Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd., 308 U.S. 165, 167-68, 84 L. Ed. 167, 60 S. Ct. 153 (1939):*

The jurisdiction of the federal courts -- their power to adjudicate -- is a grant of authority to them by Congress and thus beyond the scope of the litigants to confer. But the locality of a law suit -- the place where judicial authority may be exercised -- though defined by legislation relates to the convenience of litigants and as such is subject to their disposition.

The appropriate venue is usually guided by legislation. The habeas statute does not contain a specific venue provision in this instance. Thus this Court must look to "traditional venue **[**26]** considerations." *Braden, 410 U.S. at 493.*

The Supreme Court addressed the appropriate venue pursuant to a habeas petition in Braden. See id. There, the petitioner was detained in an Alabama prison yet brought his habeas petition in the District Court for the Western District of Kentucky. The petition was based upon the denial of a speedy trial pursuant to a Kentucky indictment. See *id. at 485-86.* After concluding that the Kentucky court had jurisdiction, the Supreme Court analyzed the issue of an appropriate forum. See *id. at 493.* According to the Court:

In terms of traditional venue considerations, the District Court for the Western District of Kentucky is almost surely the most desirable forum for the adjudication of the claim. It is in Kentucky, where all the material events took place, that the records and witnesses pertinent to petitioner's claim are likely to be found. And that forum is presumably no less convenient for the respondent and the Commonwealth of Kentucky than for the petitioner.

Id. at 493-94.

In Mojica, Judge Weinstein relied on the language cited above when he concluded **[**27]** that the Eastern District of New York and not Louisiana was the proper forum to hear the petitioners' claims for relief. See

970 F. Supp. at 167. After citing to Braden, the court concluded:

> In the instant case, these considerations strongly militate in favor of adjudicating Mojica's habeas petition in the Eastern District of New York. Until his transfer from the INS' Varick Street detention center in New York, Mojica had never been in Louisiana. The crime for which he became deportable took place in the Eastern District of New York. The witnesses and evidence necessary to establish his eligibility for 212(c) relief are all located in New York.
>
> Mojica would be severely disadvantaged by having to bring a habeas proceeding in Louisiana since his attorneys **[*152]** are located in New York and have expended extensive efforts on this matter in the Eastern District. The choice of forum could significantly affect Mojica's rights because the law varies from circuit to circuit, and as a resident of the Second Circuit for over twenty years, Mojica should have his case decided under Second Circuit law. There is also a possibility of backlog habeas petitions in Louisiana, **[**28]** which could result in Mojica's rights to habeas review being significantly delayed while he remains in detention in Louisiana, without realistic access to his attorneys or family.

Id. at 168 (citations omitted).

This is an attractive argument that appears to parallel the facts presented by Vasquez. It is not clear, however, that habeas petitions in removal cases fit as neatly into the Braden analysis as Mojica suggests. Both Mojica and the case here involve issues substantially more complex than did Braden. The petitioner in Braden was protesting the actions of the Commonwealth of Kentucky; thus the genesis of the controversy was clearly delineated. See *410 U.S. at 495.* While he was technically confined in Alabama, it was Kentucky's inaction that was interfering with his constitutional rights. See id. In reviewing the evolution of habeas jurisdiction, the Supreme Court noted that Congress has "explicitly recognized the substantial advantages of having these cases resolved in the court which originally imposed the confinement or in the court nearest the site of the underlying controversy." Id.

In Mojica, Judge **[**29]** Weinstein implicitly assumed that New York was either where

the court that "originally imposed confinement" or the "the court nearest the site of the underlying controversy" was situated. Whether this is an accurate assessment depends on whether a court looks to the criminal convictions that led to deportation as the source of confinement or the underlying controversy or whether a court looks to the removal proceedings and the decision to deny section 212(c) relief as the bases of the claim. As noted in Mojica, the choice of forum has very real consequences for a petitioner. Here, the criminal convictions and original confinement occurred in Massachusetts, while the removal proceedings ensued in Louisiana.

The First Circuit has provided guidance, albeit limited and without precedential value, in the area of forum choice. See Alvarez v. Reno, No. 98-1099, slip op. at 1 (1st Cir. Feb. 6, 1998) (unpublished opinion). Like Vasquez, Alvarez sought habeas relief arguing that AEDPA section 440(d) did not apply retroactively and he should have access to a section 212(c) waiver. See Pet. for Writ of Habeas at 7-8 (Alvarez). The government moved to dismiss the petition based **[**30]** on improper venue and lack of personal jurisdiction. See Resp. Mem. of Law (Alvarez). Judge Keeton dismissed "for want of jurisdiction of this court to issue any form of relief requested." Alvarez v. Reno, No. 98-10186-NG, slip op. at 1 (D. Mass. Jan. 30, 1998). The court determined that the contacts with Massachusetts were too limited to provide a basis for jurisdiction. See id.

Alvarez immediately appealed and the First Circuit, in a one-paragraph, unpublished opinion, affirmed the district court decision "on narrower grounds." The court concluded that "even if the district court had personal jurisdiction over one or more of the petitioner's potential custodians ... -- a matter we do not now decide," the proper forum for the petition was the Western District of Louisiana. Alvarez, slip op. at 1. The result was based on the government's representation that the deportation proceedings were held in Oakdale, Louisiana. See id. "Consequently, absent exceptional circumstances -- and we find none -- the western district of Louisiana was the proper forum to file a habeas petition." Id.

The First Circuit's conclusion in Alvarez is

consonant with the Braden [**31] analysis. Alvarez was seeking relief from the immigration judge's decision to apply section [*153] 440(d) retroactively thus making a section 212(c) waiver unavailable. Because the underlying controversy was the decision of the immigration judge in Louisiana, it was logical to assume that Louisiana was the appropriate venue. In contrast, if Alvarez had been appealing the underlying convictions that led to the removal order, the apt venue would have been Massachusetts. Based on this analysis, it appears that Louisiana is also the proper forum for the petition in this case.

The First Circuit did leave one avenue of redress open, however. The phrase "absent exceptional circumstances" suggests that the court envisaged a situation in which access to the Massachusetts District Court would be a necessity. Absent explicit guidance, it is left to this Court to further define "exceptional circumstances." This Court rules that an "exceptional circumstance" exists when a choice of forum would have a significant impact on the outcome. As Judge Weinstein noted, the law varies from circuit to circuit. Indeed, on the facts of this case, the Fifth Circuit has held that district courts do not even have jurisdiction [**32] to hear habeas petitions. Thus, if this Court was to dismiss Vasquez's petition for improper venue, it is a veritable certainty that his claim would not be heard in the district court. See *Max-George, 2000 WL 220502*, at *4 (holding section 1252[a][2][C] precludes habeas jurisdiction). n7 Moreover, because of the jurisdictional limitation contained in section 1252(a)(2)(C), Vasquez also could not seek relief in the Fifth Circuit. See *8 U.S.C. § 1252*(a)(2)(C) (providing "no court shall have jurisdiction to review any final order of deportation"). The government conceded as much at oral argument.

n7 In contrast, the petition by Alvarez was under the transitional rules and could have been heard in the Fifth Circuit. See *Requena-Rodriguez v. Pasquarell, 190 F.3d 299, 305 (5th Cir. 1999).*

As the lack of meaningful review influenced the First Circuit's decision in Wallace

regarding subject matter jurisdiction, *194 F.3d at 285*, it stands **[**33]** to reason that it would have a similar impact on a venue analysis.

Laying venue in Massachusetts compels the Court to examine the merits of Vasquez's claims.

D. **Merits**

Vasquez raises four issues in his habeas petition. The central argument of his petition, however, focuses on the retroactive application of section 440(d) and the availability of section 212(c) discretionary relief available to individuals convicted of crimes prior to the enactment of AEDPA and IIRIRA. Vasquez argues that he is eligible for relief under section 212(c) because his conviction occurred prior to the passage of the amendments. In essence, Vasquez asks this Court to revisit its conclusion in *Mattis v. Reno, 44 F. Supp. 2d 379 (D. Mass. 1999)*, in which this Court declined to extend the holding in Goncalves to individuals who were convicted prior to the enactment fo AEDPA and IIRIRA but not yet involved in deportation proceedings. In Mattis this Court concluded that petitioner was ineligible for section 212(c) relief because "the application of section 440(d) does not attach an additional consequence to Mattis' prior conduct nor does it impair a substantive right possessed by **[**34]** Mattis." Id.; accord *United States v. Gonzalez, 202 F.3d 20, 26 (1st Cir. 2000); Groccia v. Reno, 89 F. Supp. 2d 127, 2000 WL 340912*, at *4 (D. Mass. 2000)(Stearns, J.).

Subsequent to Mattis, the First Circuit decided Wallace, in which it held that section 440(d) did not apply to individuals who were in deportation proceedings prior to the enactment of the AEDPA and IRRIRA. While the temporal posture of that case differs significantly from Mattis and the case here, the narrow holding offers insight. See *Wallace, 194 F.3d at 286*. While the district court in Wallace took the view that whenever an alien pled guilty prior to AEDPA the waiver ban should not **[*154]** apply, see id., the First Circuit declined to adopt such a broad view. It left open the question of whether individuals, like Vasquez, convicted prior to the enactment but in deportation proceedings after its effective date were eligible for discretionary waivers. See *id. at 287* ("It is unnecessary to decide such matters here since both Lemos and Wallace were in

deportation proceedings prior to AEDPA.").

Without additional guidance **[**35]** from the First Circuit, Vasquez asks this Court to follow the reasoning of Mojica which is directly contrary to the reasoning in Mattis. In Mojica, Judge Weinstein determined that the right to apply for a waiver was a statutory right "which played a central role in decisions made by criminally accused lawful permanent residents." *970 F. Supp. at 178.* Further, the court concluded that the retroactive application of the law resulted in unexpected, additional consequences for past behavior. See *id. at 174.* To support this proposition the court drew an analogy to the retroactive application of criminal statutes. "Any change from a discretionary system to a system of mandatory penalties for prior crimes is retroactive. That is because the individual is being deprived of the ability to bring equitable circumstances to bear on his case." Id. (citing *Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 41 L. Ed. 2d 383, 94 S. Ct. 2532* [1974]).

This Court disagrees with this aspect of the analysis and outcome in Mojica. The reasoning in Mattis applies with equal force to the facts of this case. Vasquez did not enter **[**36]** removal proceedings until February 1999, long after the enactment of the AEDPA. Thus, section 440(d) is applicable and no discretionary relief is available pursuant to section 212(c). n8 Moreover, a recent First Circuit decision affirms the conclusion in Mattis that retroactive application of section 440(d) does not act as an additional consequence to criminal conduct. See *Gonzalez, 202 F.3d at 25;* see also *Groccia, 2000 WL 340912,* at *4.

n8 To the extent that the language of case law appears to distinguish between individuals who pled guilty, see *Wallace, 24 F. Supp. 2d 104 at 110; Mojica, 970 F. Supp. at 175,* and those who go to trial as a basis for the retroactive application of section 440(d), this Court must object. Such distinctions are without merit. Indeed, they could well unconstitutionally burden a defendant's Sixth Amendment right to trial by jury.

Vasquez's equal protection argument is equally unavailing. See *Mattis, 44 F. Supp. 2d at 385 n.5* **[**37]** (noting that as of April 1, 1997 no discretionary relief available for either deportable or excludable aliens). In order for Vasquez to maintain his equal protection argument claim here, his deportation proceedings must have been pending on April 1, 1997. That is not the case here. Vasquez was not issued an Order to Show Cause until February 1999. In any event Mattis also held that Congress, by limiting section 440(d) restrictions to "deportable aliens," articulated a legitimate legislative purpose. See id. This reasoning was subsequently upheld by the First Circuit in *Almon v. Reno, 192 F.3d 28, 32 (1st Cir. 1999).*

Vasquez's next argument, that he was not convicted of an "aggravated felony" lacks statutory support. Vasquez rests his protestation on the fact that although he was sentenced to eighteen months in jail, he was required to serve only six months. The aggravated felony definition applicable to Vasquez states "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year." *8 U.S.C. § 1101*(a)(43)(G). Read in isolation "term of imprisonment" could be deemed ambiguous; **[**38]** however, when read in conjunction with *8 U.S.C. § 1101*(a)(48)(B) the meaning is indisputable. Section 1101(a)(48)(B) provides that "any reference to a term of imprisonment ... is deemed to include the period of incarceration or confinement ordered by a court of law." The fact that Vasquez only served six months of an eighteen-month **[*155]** sentence is, therefore, without consequence.

Finally, Vasquez asks this Court to rule that the immigration judge abused his discretion by refusing to release him on bond. Whether or not this Court has jurisdiction to rule on such a discretionary decision is still a point of contention. See *Mendonca, 1999 WL 1295834,* at *1. Taking a cue from the First Circuit, there is no need to decide this particular issue. There is nothing in the record to suggest that the immigration judge abused his discretion in determining that Vasquez was a flight risk.

IV. Conclusion

For these reasons, this Court ruled on April 18, 2000 that *8 U.S.C. § 1252* did not strip the district courts of habeas

jurisdiction. Further, this Court ruled that the Attorney General is the proper custodian and is subject to **[**39]** the personal jurisdiction of this Court. Moreover, because of the lack of review available in either the district or appeals court in the Fifth Circuit, venue is proper. The petition for habeas was, however, dismissed on the merits because section 212(c) relief is unavailable to individuals convicted of prescribed offenses prior to the enactment of AEDPA and IIRIRA but not subject to removal proceedings until after April 1, 1997. On April 19, 2000, due to the complexity of the jurisdictional issues and this Court's uncertainty as to the correctness of the course it has adopted, the Court transferred the case to the First Circuit Court of Appeals pursuant to *28 U.S.C. § 1631*. At that time the Court also granted Vasquez's request for a stay. The stay was limited, however, to four weeks or until a contrary order emerged from the First Circuit Court of Appeals.

By the Court,

WILLIAM G. YOUNG

CHIEF JUDGE

FRANCISCO VASQUEZ, Petitioner, Appellant, v. JANET RENO, ATTORNEY GENERAL; DORIS MEISSNER, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE; AND STEVEN J. FARQUHARSON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE (BOSTON), Respondents, Appellees.

No. 00-1505

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

233 F.3d 688; 2000 U.S. App. LEXIS 31336

December 8, 2000, Decided

PRIOR HISTORY:
[**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. [Hon. William G. Young, U.S. District Judge].

COUNSEL:
James C. Dragon, with whom Edward Hart and Law Office of James C. Dragon P.C. were on brief, for petitioner.

Brenda M. O'Malley, Attorney, Office of Immigration Litigation, U.S. Dep't of Justice, with whom David W. Ogden, Acting Assistant Attorney General, and Terri J. Scadron, Senior Litigation Counsel, were on brief, for respondents.

JUDGES:
Before Selya, Boudin and Stahl, Circuit Judges.

OPINIONBY:
SELYA

OPINION:

[*689] **SELYA, Circuit Judge.** We are called upon to decide an important question of first impression at the appellate level: Is the Attorney General of the United States the custodian of an alien being held at a federal detention facility (and therefore a proper respondent to that alien's petition for a writ of habeas corpus)? We conclude that, as a general rule, the Attorney General is neither the custodian of such an alien in the requisite sense nor the proper respondent [**2] to a habeas petition. Since this case falls squarely within that general rule, we vacate the district court's merits-based opinion, *Vasquez v. Reno, 97 F. Supp. 2d 142 (D. Mass. 2000),* and remand with instructions to dismiss or transfer the petition.

I. BACKGROUND

The essential facts are undisputed. The petitioner, Francisco Vasquez, is a citizen of the Dominican Republic who lawfully entered the United States in 1987 and eventually established a domicile in Massachusetts. In 1993, a Massachusetts state court found him guilty of knowingly receiving stolen property, Mass. Gen. Laws ch. 266, § 60, and sentenced him to a term of immurement. Following the petitioner's release from prison, the Immigration and Naturalization Service (INS) took steps to deport him on the basis of that conviction.

[*690] The INS detained the petitioner in Boston and then transferred him to the Federal Detention Center, Oakdale, Louisiana (FDC-Oakdale). Following a hearing, an immigration judge ordered him returned to the Dominican Republic. He appealed unsuccessfully to the Board of Immigration Appeals.

Facing imminent removal, the petitioner filed an application for a writ of habeas **[**3]** corpus, *28 U.S.C. § 2241*, in the United States District Court for the District of Massachusetts. He named as respondents the Attorney General of the United States, the Commissioner of the INS, and the district director of the INS's Boston office. He did not name the district director having day-to-day control over FDC-Oakdale, presumably because that individual is stationed in New Orleans and, thus, beyond the reach of the Massachusetts district court's in personam jurisdiction.

The respondents moved to dismiss the petition on myriad grounds. The district court found that it had subject matter jurisdiction to review the removal order. *Vasquez, 97 F. Supp. 2d at 148.* It further found that it had personal jurisdiction over the three named respondents, that the Attorney General was the person who had the petitioner "in custody" for habeas purposes, n1 and that venue was properly laid in the District of Massachusetts. *Id. at 149-53.* But the court denied on the merits the petitioner's claim that he was eligible for a waiver of deportation under a now-repealed section of the Immigration and Nationality Act. *Id. at 154.* **[**4]**

n1 The court made no finding concerning the other two respondents qua custodians. We need not dwell on this omission, however, because it is plain in this instance that neither has a more cogent claim to custodian status than the Attorney General. Consequently, we treat this appeal as if the Attorney General were the sole respondent.

On appeal, the petitioner asks us to reverse this merits-based decision. The respondents defend it. As a threshold matter, however, they assert that we should not reach the merits inasmuch as the lower court (1)

lacked subject matter jurisdiction, (2) lacked personal jurisdiction over the only proper respondent (i.e., the INS official who directly supervises FDC-Oakdale), and/or (3) lacked proper venue. We reject the first of these threshold assertions out of hand. See *Mahadeo v. Reno, 226 F.3d 3, 10 (1st Cir. 2000)* (holding that district courts continue to have subject matter jurisdiction in alien cases under *28 U.S.C. § 2241*, notwithstanding **[**5]** the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, 3546 (codified as amended in scattered sections of the United States Code)). But we find the respondents' second assertion persuasive: in our view, the case cannot proceed due to the petitioner's failure to name his true custodian (the INS district director for Louisiana) as the respondent to his petition. Accordingly, we have no need to mull the other issues raised by the parties.

II. THE LEGAL LANDSCAPE

Congress has stipulated that a writ of habeas corpus granted by a district court "shall be directed to the person having custody of the person detained." *28 U.S.C. § 2243*. This means, of course, that the court issuing the writ must have personal jurisdiction over the person who holds the petitioner in custody. *Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 495, 35 L. Ed. 2d 443, 93 S. Ct. 1123 (1973); United States v. Barrett, 178 F.3d 34, 50 n.10 (1st Cir. 1999)*, cert. denied, *145 L. Ed. 2d 1110, 120 S. Ct. 1208 (2000); Guerra v. Meese, 252 U.S. App. D.C. 1, 786 F.2d 414, 415 (D.C. Cir. 1986)* **[**6]** (per curiam). Jurisdiction over the custodian is paramount because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Braden, 410 U.S. at 494-95*.

Although clearly articulating the baseline requirement of jurisdiction over **[*691]** the custodian, the Braden Court provided limited guidance for determining the identity of the custodian in any given case. Other Supreme Court precedents are equally inscrutable on this point. The courts of appeals have been more forthcoming. They have held with echolalic regularity that a prisoner's proper custodian for purposes of habeas

review is the warden of the facility where he is being held. E.g., *Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992)* (per curiam); *Blango v. Thornburgh, 942 F.2d 1487, 1491-92 (10th Cir. 1991)* (per curiam); *Brennan v. Cunningham, 813 F.2d 1, 12 (1st Cir. 1987); Monk v. Secretary of Navy, 253 U.S. App. D.C. 293, 793 F.2d 364, 368-69 (D.C. Cir. 1986); Guerra, 786 F.2d at 416; Billiteri v. United States Bd. of Parole, 541 F.2d 938, 948 (2d Cir. 1976);* **[**7]** *United States v. DiRusso, 535 F.2d 673, 676 (1st Cir. 1976); Jones v. Biddle, 131 F.2d 853, 854 (8th Cir. 1942).* The warden is the proper custodian because he has day-to-day control over the petitioner and is able to produce the latter before the habeas court. *Blango, 942 F.2d at 1492 n.10; Guerra, 786 F.2d at 416.*

In the prisoner context, a number of courts have specifically rejected the argument that a petitioner's proper custodian for habeas purposes is the Attorney General. E.g., *Blango, 942 F.2d at 1491-92; Sanders v. Bennett, 80 U.S. App. D.C. 32, 148 F.2d 19, 20 (D.C. Cir. 1945); Jones, 131 F.2d at 854; Connally v. Reno, 896 F. Supp. 32, 35 (D.D.C. 1995); De Maris v. United States, 187 F. Supp. 273, 275-76 (S.D. Ind. 1960).* These courts reason that while the Attorney General is the ultimate overseer of all federal prisoners, see *18 U.S.C. § 4001*(2), she is not responsible for day-to-day prison operations and does not hold prisoners in actual physical custody. Consequently, a demand to produce **[**8]** the body of the prisoner is more logically directed to the person who does have day-to-day control and actual physical custody, namely, the warden. n2 Given this solid wall of authority and the impeccable logic that supports it, we consider it settled beyond cavil that when a prisoner petitions for a writ of habeas corpus under *28 U.S.C. § 2241*, he must name as the respondent the superintendent of the facility in which he is being held.

n2 These courts also express understandable concern about the practical effect of allowing a prisoner to name the Attorney General as his custodian in a habeas petition. E.g., *Sanders, 148 F.2d at 20* (noting that an interpretation of custodian that would

> open the courts of a given district to all federal prisoners "is without justification either in convenience or logic").

Notwithstanding this uniform view, the case law concerning the identity of the proper respondent to habeas petitions brought by detained aliens is much more sparse **[**9]** and far less coherent. On the only occasion when the question of whether the Attorney General is a proper respondent to an alien habeas petition surfaced in the Supreme Court, the Justices adroitly sidestepped it. See *Ahrens v. Clark, 335 U.S. 188, 193, 92 L. Ed. 1898, 68 S. Ct. 1443 (1948).* In dictum, two courts of appeals have addressed -- but stopped short of authoritatively answering -- the question. n3 In *Yi v. Maugans, 24 F.3d 500 (3d Cir. 1994),* the Third Circuit quickly dismissed the idea that the Attorney General might be a proper respondent in an alien habeas case. The court reasoned that the existence of a power to release cannot definitively determine the identity of the proper custodian, "otherwise, the Attorney General of the United States could be considered the custodian of every alien and prisoner in custody because ultimately she controls the district directors and the prisons." *Id. at 507.* The Second Circuit pondered the problem at greater length, reviewed the arguments pro and con, and manifested some uncertainty as to the answer. See **[*692]** *Henderson v. INS, 157 F.3d 106, 124-28 (2d Cir. 1998).* In the **[**10]** end, however, the court determined that it could leave the conundrum unsolved. *Id. at 128.*

> n3 A few years ago, we ourselves issued an unpublished order that touched upon this subject. Alvarez v. Reno, No. 98-1099 (1st Cir. Feb. 6, 1998). That order has no precedential value, see 1st Cir. R. 36(b)(2)(F), and we do not discuss it further.

Several trial courts have tackled this question, but their decisions are in considerable disarray. One line of cases, conceived and nurtured primarily in the Eastern District of New York, holds that the Attorney General is a proper respondent to an alien habeas

petition. This notion had a modest beginning. In the seminal case, the court acknowledged the existence of "compelling reasons of policy why the Attorney General should not normally be regarded as the custodian of a habeas petitioner." *Nwankwo v. Reno, 828 F. Supp. 171, 173-74 (E.D.N.Y. 1993).* Withal, the court remarked the heavy crush of deportation proceedings in the Western District **[**11]** of Louisiana (the location of FDC-Oakdale) and fretted that transfer of the case to that district likely would "deny petitioner any meaningful habeas corpus relief." *Id. at 174.* With these "unusual circumstances" in mind, the court crafted an exception to the general rule and found the Attorney General to be the proper custodian. *Id. at 175.*

A few years later, the Nwankwo exception was transformed into a rule of general application. In *Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y. 1997),* the court held squarely that the Attorney General was the custodian of an alien held in Louisiana, and thus was a proper respondent to the alien's habeas petition in the Eastern District of New York. *Id. at 166.* The court reasoned that the petitioner had several custodians, and that nothing in the relevant statute, *28 U.S.C. § 2243,* required habeas proceedings to be brought against an immediate custodian. Id. Because the Attorney General could order her subordinates to carry out an order to produce or release the petitioner, she was an appropriate custodian (and, therefore, an appropriate habeas respondent). **[**12]** *Id. at 166-67.*

A handful of district courts have reached similar results. E.g., *Alcaide-Zelaya v. McElroy, 2000 U.S. Dist. LEXIS 15714,* No. 99 Civ. 5102(DC), *2000 WL 1616981,* at *4 (S.D.N.Y. Oct. 27, 2000); *Pena-Rosario v. Reno, 83 F. Supp. 2d 349, 362 (E.D.N.Y. 2000); Pottinger v. Reno, 51 F. Supp. 2d 349, 357 (E.D.N.Y. 1999);* cf. *Arias-Agramonte v. Commissioner of INS, 2000 U.S. Dist. LEXIS 10724, No. 00 CIV2412 (RWS), 2000 WL 1059678,* at *6-8 (S.D.N.Y. Aug. 1, 2000) (concluding that Commissioner of INS, rather than district director, was the appropriate custodian and thus the proper respondent to an alien habeas petition). Others have been less sanguine. E.g., *Valdivia v. INS, 80 F. Supp. 2d 326, 333 (D.N.J. 2000)* (implicitly rejecting broad definition of custodian by

transferring alien habeas petition to district in which petitioner was being detained); *Ozoanya v. Reno, 968 F. Supp. 1, 8 (D.D.C. 1997)* (transferring alien habeas petition to Western District of Louisiana, so that court would have personal jurisdiction over petitioner's custodian, INS district director in Louisiana); *Carvajales-Cepeda v. Meissner, 966 F. Supp. 207, 208 (S.D.N.Y. 1997)* **[**13]** (similar); *Michael v. INS, 870 F. Supp. 44, 47 (S.D.N.Y. 1994)* (ordering transfer to Western District of Louisiana because proper custodian was not INS generally but INS district director in Louisiana); *Wang v. Reno, 862 F. Supp. 801, 812-13 (E.D.N.Y. 1994)* (distinguishing Nwankwo and rejecting Attorney General as alien's custodian for habeas purposes); *Iheme v. Reno, 819 F. Supp. 1192, 1196 (E.D.N.Y. 1993)* (ordering transfer to Western District of Louisiana because Attorney General was not proper custodian); *Chukwurah v. United States, 813 F. Supp. 161, 168 (E.D.N.Y. 1993)* (ordering transfer because alien's proper custodian was the warden of his detention facility in Colorado); *Peon v. Thornburgh, 765 F. Supp. 155, 156 (S.D.N.Y. 1991)* (rejecting contention that Attorney General was alien's custodian for habeas purposes and transferring petition accordingly).

III. ANALYSIS

Against this chiaroscuro backdrop, we turn to the question of whether **[*693]** an alien detained under the immigration laws may designate the Attorney General as the respondent to his habeas petition. In answering this quintessentially **[**14]** legal question, we afford de novo review. See *Phoenix v. Matesanz, 189 F.3d 20, 24 (1st Cir. 1999); Simpson v. Matesanz, 175 F.3d 200, 205 (1st Cir. 1999)*, cert. denied, *145 L. Ed. 2d 677, 120 S. Ct. 803 (2000)*. We conclude that, as a general rule, he may not.

In the first place, consistency almost always is a virtue in the law -- and consistency strongly suggests this result. In terms of identifying a proper custodian, there is no principled distinction between an alien held in a detention facility awaiting possible deportation and a prisoner held in a correctional facility awaiting trial or serving a sentence. Since the case law establishes that the warden of the penitentiary -- not the Attorney General -- is the

person who holds a prisoner in custody for habeas purposes, it would be not only illogical but also quixotic to hold that the appropriate respondent in an alien habeas case is someone other than the official having day-to-day control over the facility where the alien is being detained.

In the second place, the text of *28 U.S.C. § 2243* indicates that there is only one proper respondent to a habeas **[**15]** petition: "The writ ... shall be directed to the person having custody of the person detained." Id. (emphasis supplied). Section 2243 does not indicate that a petitioner may choose from among an array of colorable custodians, and there is nothing about the nature of habeas practice that would justify a court in stretching the statute's singular language to encompass so mischievous an interpretation.

To cinch matters, the lone statutory clue to the identity of the custodian is found in the same statute. The person to whom the writ is directed is "required to produce at the hearing the body of the person detained." Id. The individual best able to produce the body of the person detained is that person's immediate custodian, his "jailor" in the parlance of an earlier time. *In re Jackson, 15 Mich. 417, 439 (1867)*, quoted with approval in *Braden, 410 U.S. at 495;* accord *Ex parte Endo, 323 U.S. 283, 306, 89 L. Ed. 243, 65 S. Ct. 208 (1944)*. The immediate custodian rule effectuates section 2243's plain meaning and gives a natural, commonsense construction to the statute. As an added bonus, the rule is clear and easily administered. **[**16]** That is particularly helpful in the rapidly evolving field of immigration law, since it affords the courts and the parties a measure of stability and predictability.

Those who favor treating the Attorney General as the custodian of alien habeas petitioners (and, thus, as a proper respondent to such petitions) make three countervailing arguments: (1) unless the Attorney General is deemed a suitable custodian (thus permitting litigation of alien habeas petitions virtually anywhere the petitioner chooses), the backlog of habeas cases in the Western District of Louisiana will render the habeas remedy nugatory; (2) the case law favors a practical, rather than a formulaic, approach to the identity of the custodian in alien habeas cases; and (3) the

Attorney General has a unique role in immigration matters that renders her an appropriate respondent. None of these arguments carries the day.

The driving force behind the expanding conception of "custodian" in alien habeas cases seems to be the perception that the relief provided to petitioners in the Western District of Louisiana is inadequate because the court there is swamped with petitions from detainees at FDC-Oakdale. E.g., *Nwankwo, 828 F. Supp. at 174* **[**17]** (expressing concern that "a transfer of the case to the Western District of Louisiana may deny petitioner any meaningful habeas corpus relief"). This perception is not pulled out of thin air: the Fifth Circuit (which has jurisdiction over Louisiana and, hence, over FDC-Oakdale) noted a few years ago, albeit in a different context, that the "atypical and unanticipated volume of habeas petitions ... is beyond **[*694]** the capability of the district court to process in a timely fashion." *Emejulu v. INS, 989 F.2d 771, 772 (5th Cir. 1993).* The question, then, is whether an admittedly overcrowded docket justifies expanding the dimensions of a standard legal term ("custodian").

In answering this question, we are aided by an historical parallel. Congress faced a similar problem in the 1940s, when the number of prisoner habeas petitions rose sharply. See *United States v. Hayman, 342 U.S. 205, 212 & n.13, 96 L. Ed. 232, 72 S. Ct. 263 (1952).* Because there were relatively few federal penitentiaries and prisoners were required to bring their petitions where they were incarcerated, several district courts were inundated with habeas filings. *Id. at 213-14* **[**18]** (noting that certain courts in districts that housed major federal correctional institutions were "required to handle an inordinate number of habeas corpus actions far from the scene of the facts, the homes of the witnesses and the records of the sentencing court"). Congress responded to this vexing situation by enacting *28 U.S.C. § 2255,* a statute that gave federal prisoners the option of attacking their convictions collaterally in the sentencing court.

We find this history instructive. It illustrates that there are better solutions to burgeoning caseloads than rewriting the legal lexicon. If Congress apprehends that an overcrowding of the dockets of certain district courts threatens

to interfere with the rights of habeas petitioners, it has demonstrated an ability to rectify that condition through legislation. n4 In our view, proceeding in this measured fashion is far superior to attempting to resolve the problem of a habeas overload in the Western District of Louisiana by rewriting, judicially, the time-honored definition of the term "custodian."

n4 We recognize that the Second Circuit viewed this sequence of events as militating in favor of treating the Attorney General as a proper respondent to an alien habeas petition. *Henderson, 157 F.3d at 124-25.* It reasoned that the passage of corrective legislation (section 2255) somehow indicates Congress's preference for a broad conception of custody in the habeas context. Id. We respectfully disagree with this assessment.

[19]**

A legislative solution is preferable in at least three respects. For one thing, allowing alien habeas petitioners to name the Attorney General (over whom all district courts presumably have personal jurisdiction) as a respondent will encourage rampant forum shopping. The case at hand is a prime example. The petitioner's decision to seek habeas relief in Massachusetts likely was motivated by the fact that the law of the Fifth Circuit is markedly less favorable to alien habeas petitioners than the law of the First Circuit. n5 For another thing, adopting a broad conception of who qualifies as a custodian will make the litigation of habeas claims more complex, forcing courts in many cases to undertake fact-intensive analyses of venue and forum non conveniens issues. Third, and finally, every action has an equal and opposite reaction. Thus, although permitting the Attorney General to serve as a habeas respondent may ease the caseload crunch in the Western District of Louisiana, it may well clog the dockets in those districts in which disproportionate numbers of aliens reside.

n5 The Fifth Circuit has determined that IIRIRA effectively

revoked the district courts' jurisdiction to entertain habeas petitions brought by detained aliens pursuant to *28 U.S.C. § 2241. Max-George v. Reno, 205 F.3d 194, 198 (5th Cir. 2000).* The First Circuit has resolved this question the other way. *Mahadeo, 226 F.3d at 10; Wallace v. Reno, 194 F.3d 279, 285 (1st Cir. 1999); Goncalves v. Reno, 144 F.3d 110, 133 (1st Cir. 1998).*

[20]**

For these reasons, we conclude that the plenitude of habeas cases pending in the Western District of Louisiana does not justify departing from the clear, well-established principle that the proper respondent to a habeas petition is the immediate custodian of the petitioner's person. Should the situation reach crisis proportions -- and to date, it has not -- we are confident **[*695]** that Congress can craft a suitable legislative solution.

The next argument for elasticity, in preference to a set rule, rests upon the faulty premise that the case law reflects an historic receptivity to an expanded definition of custodian in the alien habeas context. This argument derives principally from three cases. We address the first two together, then turn to the third.

In the first case, the petitioner was among those persons caught up in the ill-advised internment of Japanese Americans during the Second World War. The Supreme Court permitted the District Court for the Northern District of California to maintain jurisdiction over her habeas petition even after the government moved her to Utah, reasoning that there were appropriate respondents (such as the Acting Secretary of the Interior) still within **[**21]** the jurisdiction of the forum court. *Endo, 323 U.S. at 304- 07.* Similarly, in the second case, the district court was allowed to retain jurisdiction over a properly-filed habeas petition notwithstanding the INS's subsequent transfer of the alien to another state. *United States ex rel. Circella v. Sahli, 216 F.2d 33, 37 (7th Cir. 1954).*

The distinction between these two cases and the case at bar is transparently clear. In both Endo and Circella, the petitioners had filed their petitions in the jurisdictions in

which they were being held. In each instance, the appellate court held that the government could not sidetrack a properly-filed habeas petition by changing the petitioner's place of detention after the court's jurisdiction had attached. *Endo, 323 U.S. at 307; Circella, 216 F.2d at 37.* Such cases are at a considerable remove from cases like this one, in which the petitioner filed for habeas relief in a jurisdiction where neither he nor his immediate custodian was physically present.

The third case in this trilogy is *Strait v. Laird, 406 U.S. 341, 32 L. Ed. 2d 141, 92 S. Ct. 1693 (1972).* **[**22]** There, an Army Reserve officer sued in a California federal court seeking a discharge as a conscientious objector. *Id. at 342.* California was his place of habitual residence, the place where he had been commissioned, and the place where hearings on his conscientious objector application had been held. *Id. at 343.* The government argued that the case belonged in Indiana, where the petitioner's records were kept under the watchful eye of his nominal commanding officer. The Supreme Court upheld the jurisdiction of the California court, noting that all the petitioner's face-to-face contacts with the military had occurred in California and that he had never been to Indiana. *Id. at 344.* The Court brushed aside the fiction of an Indiana custodian, according decretory significance to the fact that the petitioner and the officers with whom he had dealt were all in California. n6 That state of affairs does not obtain here. The petitioner's removal proceedings were conducted in Louisiana and he is being held in custody there.

n6 To be sure, the Court's opinion contains a sweeping statement to the effect that "the concepts of 'custody' and 'custodian' are sufficiently broad to allow us to say that the commanding officer in Indiana, operating through officers in California ... is in California for the limited purposes of habeas corpus jurisdiction." *Strait, 406 U.S. at 345-46.* This statement, however, is not intended to be a rule of general application, but, rather, to explain the fact-specific holding in the case itself -- a case in which the petitioner had never been

nor ever been "assigned to be" in the state where his "nominal custodian" was stationed, *id. at 344-45.*

[23]**

To sum up, this trilogy of cases simply does not give a legitimate judicial imprimatur to a freewheeling definition of "custodian" such as the petitioner champions. At most, the three decisions represent idiosyncratic responses to highly unusual facts. They cannot plausibly be read, singly or in combination, to consign to the scrap heap the substantial body of well-reasoned authority holding that a detainee **[*696]** must name his immediate custodian as the respondent to a habeas petition.

The final argument in favor of the Attorney General as a proper respondent to an alien habeas petition relates to her unique role in immigration matters. Congress has designated the Attorney General as the steward of alien detainees, see *8 U.S.C. § 1226*(c)(1), and she obviously has the power to produce the body of any alien held in custody. She is the ultimate administrative decisionmaker as to matters regarding the INS. *8 U.S.C. § 1103*(a)(1). Furthermore, she has considerable discretion over the detention and removal of aliens. See *8 U.S.C. § § 1226*(e), 1227(a), 1229b(a).

Despite these important responsibilities, we are not persuaded **[**24]** by the petitioner's position. The Attorney General's role with regard to aliens is not materially different from her role with regard to prisoners -- at least not different enough to justify a rule that she is the custodian of aliens, but not prisoners, for habeas purposes. After all, the Attorney General is the designated custodian of prisoners to much the same extent as she is the designated custodian of aliens. Compare *18 U.S.C. § 4001*(2) with *8 U.S.C. § 1226*(c)(1). And just as she has the ultimate authority to produce the body of an alien, she has the ultimate authority to produce the body of a prisoner.

That ends the matter. Having assayed the arguments advanced for the proposition that the Attorney General is the proper respondent in alien habeas cases, we find no compelling reason for supporting such a rule. Moreover, we can discern no principled basis for adopting a different, more expansive

meaning of the word "custodian" in the immigration context as opposed to the prisoner context. Accordingly, we hold that an alien who seeks a writ of habeas corpus contesting the legality of his detention by the INS normally must name **[**25]** as the respondent his immediate custodian, that is, the individual having day-to-day control over the facility in which he is being detained.

We say "normally" because we can envision that there may be extraordinary circumstances in which the Attorney General appropriately might be named as the respondent to an alien habeas petition. Perhaps the best reported example is *Demjanjuk v. Meese, 251 U.S. App. D.C. 310, 784 F.2d 1114, 1116 (D.C. Cir. 1986),* in which the court concluded that the Attorney General was a proper respondent when the habeas petitioner, a suspected Nazi war criminal facing extradition, was being detained in an undisclosed location. Another example of an extraordinary circumstance might be a case in which the INS spirited an alien from one site to another in an attempt to manipulate jurisdiction. Here, however, the petitioner has neither marshaled facts suggesting furtiveness nor made a showing of the elements necessary to demonstrate bad faith. See generally Costa v. INS, F.3d , , *2000 U.S. App. LEXIS 29723 (1st Cir. 2000)* [No. 99-2357, slip op. at 13-14] (discussing those elements).

In all events, we need not sculpt the contours of this narrow exception here. **[**26]** It suffices to say that the record contains no hint of anything that might qualify as an extraordinary circumstance. Certainly, the fact that the petitioner must bring his habeas case in Louisiana is not extraordinary. Congress has explicitly provided that noncriminal aliens must seek review of deportation orders in the court of appeals for the judicial circuit in which the Immigration Court conducted the underlying proceedings. *8 U.S.C. § 1252*(b)(2). In light of this provision, it would be bizarre -- and manifestly unfair to noncriminal aliens -- to use an "extraordinary circumstance" exception to allow criminal aliens routinely to bring habeas petitions in a jurisdiction unconnected with the forum in which the question of deportability was initially litigated. In a related vein, we categorically reject the petitioner's suggestion that the

more favorable legal climate prevailing in the First Circuit constitutes an extraordinary circumstance. We would **[*697]** be promoting a peculiarly opportunistic type of forum shopping were we to rule that it did.

IV. CONCLUSION

We need go no further. Because the petitioner did not direct his habeas petition "to the **[**27]** person having custody of the person detained," *28 U.S.C. § 2243*, the district court ought not to have acted on the merits. Hence, we vacate the lower court's decision and remand for the entry of an order either dismissing the petition without prejudice for failure to name the proper respondent or transferring it to the Western District of Louisiana, as the court sees fit.

It is so ordered.

Supreme Court, U.S.
FILED
JUL 13 2001
OFFICE OF THE CLERK

No. 00-1719

In the Supreme Court of the United States

FRANCISCO VASQUEZ, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an alien detained by the Immigration and Naturalization Service who seeks to contest the validity of his final removal order by petition for a writ of habeas corpus must name as the respondent to the habeas corpus petition the official having day-to-day control over the facility in which the petitioner is detained and must proceed against that official in a judicial district where personal jurisdiction over that official and venue for an action against that official are proper, or whether the alien may proceed against the Attorney General of the United States as the respondent to the petition.

2. Whether the district court had subject-matter jurisdiction under the federal habeas corpus statute, 28 U.S.C. 2241, to entertain petitioner's challenge to his final removal order.

3. Whether the Board of Immigration Appeals erred in concluding that petitioner is not eligible for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994), because his removal proceeding was commenced after the repeal of Section 1182(c) became effective on April 1, 1997.

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JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 50-65) is reported at 233 F.3d 688. The opinion of the district court (Pet. App. 28-49) is reported at 97 F. Supp. 2d 142.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2000. The petition for a writ of certiorari was filed on March 8, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of the Dominican Republic who was admitted to the United States as a

lawful permanent resident in 1987, and who ultimately established a domicile in Massachusetts. Pet. App. 29, 51. In 1993, petitioner was convicted in Massachusetts state court, after a jury trial, of knowingly receiving stolen property. He was sentenced to a prison term of 18 months, of which he served six months. *Id.* at 29-30, 51; Pet. 4. Under the Immigration and Nationality Act (INA), petitioner's offense was an "aggravated felony." See 8 U.S.C. 1101(a)(43)(G) (Supp. V 1999) (aggravated felony includes "a theft offense (including receipt of stolen property) * * * for which the term of imprisonment [is] at least one year"); 8 U.S.C. 1101(a)(48)(B) (Supp. V 1999) ("term of imprisonment" includes entire period of imprisonment ordered by court, whether or not defendant serves that entire period).

In February 1999, the Immigration and Naturalization Service (INS) commenced removal proceedings against petitioner based on his aggravated-felony conviction. See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999) (aggravated-felony conviction renders alien deportable). The INS took petitioner into custody and transferred him to a federal detention center in Oakdale, Louisiana. Following a hearing in the Oakdale facility, an Immigration Judge (IJ) found that petitioner was removable based on his aggravated-felony conviction, and ordered him removed to the Dominican Republic. App., *infra*, 1a-2a. Petitioner appealed to the Board of Immigration Appeals (BIA), which affirmed the removal decision. *Id.* at 3a-7a. As pertinent here, the BIA rejected petitioner's contention that he was eligible for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994), on the ground that petitioner's removal proceeding was commenced after April 1, 1997, when the repeal of Section 1182(c) became effective. *Id.* at 6a.

2. On April 4, 2000, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts. His petition named as respondents the Attorney General of the United States, the Commissioner of Immigration and Naturalization, and the Boston District Director of INS, but did not name as a respondent the New Orleans District Director of INS, who manages the Oakdale detention center. See Pet. App. 52 n.1. Petitioner contended that, because his conviction predated the repeal of Section 1182(c), that repeal may not be applied retroactively to his case. In response, the government argued, as relevant here, that the Attorney General, the Commissioner, and the Boston District Director were not proper respondents to the habeas corpus petition, and that any such petition could proceed (if at all) only against the New Orleans District Director, the official with day-to-day control over the facility where petitioner was detained, in a court where personal jurisdiction over that official and venue would be proper. The government also argued that the district court lacked subject-matter jurisdiction over the petition, and that petitioner was statutorily ineligible for discretionary relief from deportation under Section 1182(c), because his 1999 removal proceeding was commenced after the repeal of Section 1182(c) became effective on April 1, 1997.

The district court rejected the government's threshold arguments, ruling that it had subject-matter jurisdiction over petitioner's challenge to his removal order (Pet. App. 32-38), that the Attorney General is the custodian for INS detainees nationwide and thus was a proper respondent to a habeas corpus petition over whom the district court had personal jurisdiction (*id.* at 38-41), and that venue was also proper in the

District of Massachusetts (*id.* at 41-46). The court rejected petitioner's habeas claim on the merits, however. It ruled that petitioner was not eligible for discretionary relief from deportation under Section 1182(c), because the availability of such relief was repealed on April 1, 1997, before the commencement in 1999 of the removal proceeding against petitioner. *Id.* at 46-47.

3. Petitioner appealed. Relying on circuit precedent, the court of appeals rejected the government's argument that the district court lacked subject-matter jurisdiction over petitioner's habeas corpus petition. Pet. App. 53. Nonetheless, the court agreed with the government that "the case cannot proceed due to the petitioner's failure to name his true custodian (the INS district director for Louisiana) as the respondent to his petition." *Ibid.* Accordingly, the court vacated the district court's dismissal of the habeas corpus petition on the merits, and remanded the case for an order dismissing the petition without prejudice or transferring it to the Western District of Louisiana, where petitioner is actually held in custody. *Id.* at 65.

The court first noted (Pet. App. 53) that the habeas corpus statute, 28 U.S.C. 2243, provides that the writ "shall be directed to the person having custody of the person detained." Jurisdiction over the person having actual custody of the petitioner is essential, the court explained, because, as this Court stated in *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 494-495 (1973), "[t]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." Although *Braden* provided only "limited guidance for determining the identity of the custodian in any given case," the court noted further that the courts of appeals have generally agreed that "a prisoner's proper custo-

dian for purposes of habeas review is the warden of the facility where he is being held," as the warden "has day-to-day control over the petitioner and is able to produce the latter before the habeas court." Pet. App. 53-54.

The court further observed that, in the context of habeas corpus petitions filed by federal prisoners held under criminal sentences, several courts have rejected the contention that the Attorney General is the prisoner's ultimate custodian and therefore is properly named as a respondent. Pet. App. 54. Those courts have reasoned that, while the Attorney General is "the ultimate overseer of all federal prisoners," he is nonetheless "not responsible for day-to-day prison operations and does not hold prisoners in actual physical custody." *Ibid.* Consequently, the court continued, "a demand to produce the body of the prisoner is more logically directed to the person who does have day-to-day control and actual physical custody, namely, the warden." *Ibid.*

The court then similarly concluded that, in the immigration context, the "person having custody" of a detained alien is normally not the Attorney General, but rather the "official having day-to-day control over the facility where the alien is being detained." Pet. App. 58.[1] The court acknowledged that its ruling might

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[1] The court acknowledged the possibility of "extraordinary circumstances" in which the Attorney General might appropriately be named as the respondent to the habeas corpus petition—for example, if an alien was being held in an undisclosed location, or if the INS was moving an alien from site to site in an effort to manipulate jurisdiction. See Pet. App. 64. Neither the court nor petitioner suggested, however, that this case involves such circumstances. The court also distinguished cases (*id.* at 61-62) in which the detained person challenging his custody filed his habeas corpus petition in the district where he was initially detained, but the

result in habeas corpus petitions being concentrated in a few federal judicial districts where detention facilities are located. *Id.* at 59. The court also noted, however, that a similar concern had arisen in the 1940s, when the number of federal-prisoner habeas corpus petitions rose sharply, and Congress responded by enacting 28 U.S.C. 2255 (1994 & Supp. V 1999), which permits federal prisoners to raise collateral challenges to their convictions in the original sentencing court. Thus, the court noted, "there are better solutions to burgeoning caseloads than rewriting the legal lexicon" concerning who is the custodian of a federal detainee, but such solutions lie with Congress. Pet. App. 59-60. Because the Massachusetts district court lacked personal jurisdiction over the proper respondent, the New Orleans INS District Director who manages the INS detention facility in Louisiana, the court of appeals vacated the district court's decision and remanded for the entry of an order either dismissing the petition without prejudice or transferring it to the Western District of Louisiana. *Id.* at 65.

ARGUMENT

Petitioner urges this Court to grant review to determine whether an alien held in custody by the INS who seeks to challenge, by habeas corpus, the validity of his final removal order must name as the respondent the official having day-to-day control over the facility in which the alien is detained, and consequently whether only a court having personal jurisdiction over that official may adjudicate the claims in the alien's habeas corpus petition. Petitioner argues that the Attorney

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government subsequently moved the prisoner to another location, and the court in which the petition was filed continued to adjudicate the case.

General is a proper respondent to such a habeas corpus petition, and thus the District of Massachusetts was a proper forum for this habeas corpus petition, since (he argues) the Attorney General is subject to the personal jurisdiction of all the federal district courts. See Pet. 5-9. The court of appeals correctly ruled, however, that the INS New Orleans District Director would be the only proper respondent to a habeas corpus petition brought by petitioner, that the Attorney General was not a proper respondent, and that the District of Massachusetts therefore did not have personal jurisdiction over the proper respondent in this case. That decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.[2]

1. The court of appeals correctly concluded that the Attorney General was not a proper respondent to the habeas corpus petition. That conclusion follows from the text of the habeas corpus statute, which provides that "[t]he writ * * * shall be directed to *the person* having custody of the person detained." 28 U.S.C. 2243 (emphasis added). As the court of appeals cogently explained, that statutory language indicates that the proper respondent to a habeas corpus petition is ordinarily the person with day-to-day custody of the individual detained; it does "not indicate that a petitioner may choose from among an array of colorable custodians, and there is nothing about the nature of habeas practice that would justify a court in stretching the statute's singular language." Pet. App. 57. Moreover, the custodian to whom the writ is directed is required by the habeas corpus statute "to produce at

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[2] Similar issues are also presented in the pending petition for a writ of certiorari in *Neufville* v. *Ashcroft*, No. 00-9165.

the hearing the body of the person detained" (28 U.S.C. 2243), and the "individual best able to produce the body of the person detained is that person's immediate custodian" (Pet. App. 58). In short, the "immediate custodian rule effectuates section 2243's plain meaning and gives a natural, commonsense construction to the statute. As an added bonus, the rule is clear and easily administered [and] it affords the courts and the parties a measure of stability and predictability." *Ibid.*

The person with custody over an alien, such as petitioner, held pursuant to a final removal order is ordinarily the INS District Director with immediate responsibility for the alien in detention, not a high-level official such as the Attorney General or the Commissioner of Immigration and Naturalization. Although the Attorney General and the Commissioner are ultimately responsible for the supervision of aliens held in detention, they exercise that responsibility through other officers, such as the District Directors, who are charged with the actual management of the detention of aliens. In addition, bringing an action against a District Director as respondent in a judicial district where that District Director is properly subject to personal jurisdiction advances the efficiency of the habeas corpus proceeding. In this case, for example, petitioner's removal proceeding was held in Louisiana, where he was detained, and so the records of the removal proceeding are in that district. See p. 2, *supra*. And "in many instances the district in which [habeas] petitioners are held will be the most convenient forum for the litigation of their claims." *Braden*, 410 U.S. at 500.

No court of appeals has held, to the contrary, that the Attorney General is ordinarily a proper respondent to a

habeas corpus petition brought by a detained alien.[3] The court of appeals' decision, moreover, is consistent with precedent under Section 2243 in the analogous context of habeas corpus petitions brought by federal prisoners held under criminal sentences. The courts of appeals have uniformly held that a petition for a writ of habeas corpus brought by such a federal prisoner must name the warden or superintendent of the facility in which he is being held as the respondent, and not the Attorney General or some other high-level official or a federal agency. See *Brittingham* v. *United States*, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam); *Blango* v. *Thornburgh*, 942 F.2d 1487, 1491-1492 (10th Cir. 1991) (per curiam); *Guerra* v. *Meese*, 786 F.2d 414, 416 (D.C. Cir. 1986) (per curiam); *Billiteri* v. *United States Bd. of Parole*, 541 F.2d 938, 948 (2d Cir. 1976); *Sanders* v. *Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945); *Jones* v. *Biddle*, 131 F.2d 853, 854 (8th Cir. 1942), cert. denied, 318 U.S. 784 (1943). Those courts have reasoned that, although the Attorney General is ultimately responsible for management of the federal prisons, he does not hold prisoners in actual physical custody, nor is he actually responsible for the day-to-day operations of a

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[3] Only two other courts of appeals have addressed that issue. The Third Circuit has suggested that the Attorney General would not be a proper respondent to such a habeas corpus petition. See *Yi* v. *Maugans*, 24 F.3d 500, 507 (1994). The Second Circuit was presented with that question in *Henderson* v. *INS*, 157 F.3d 106, 122-128 (1998), cert. denied, 526 U.S. 1004 (1999), but ultimately found it unnecessary to resolve the issue because the government withdrew its appeal from the district court decision exercising jurisdiction over a challenge to a deportation order brought by an alien who had named the Attorney General as the respondent to his habeas corpus petition. See *Yesil* v. *Reno*, 175 F.3d 287, 288 (2d Cir. 1999) (per curiam).

particular prison. Pet. App. 54. A demand to produce a federal prisoner is more logically directed to the person who has actual physical custody and day-to-day control, the warden. *Ibid.* And "[s]ince the case law establishes that the warden of the penitentiary—not the Attorney General—is the person who holds a prisoner in custody for habeas purposes, it would be not only illogical but also quixotic to hold that the appropriate respondent in an alien habeas case is someone other than the official having day-to-day control over the facility where the alien is being detained." *Id.* at 57-58.[4]

The court of appeals' decision is also consistent with this Court's decision in *Braden*. In *Braden*, the Court held that a prisoner serving a sentence in an Alabama prison could pursue a petition for a writ of habeas corpus in the United States District Court for the Western District of Kentucky against Kentucky officials to compel those officials to give him the speedy trial required by the Sixth Amendment, even though he was not subject to the territorial jurisdiction of the Kentucky district court. In that case, the Court did not address who should be named as the respondent to such

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[4] Petitioner acknowledges that a federal prisoner's habeas corpus petition must name the warden, not the Attorney General, as the respondent. Pet. 6. Nonetheless, petitioner contends, citing statutes that vest the Attorney General with a special role in immigration matters (*id.* at 7-8), that for habeas purposes, the Attorney General's relationship to an alien is distinguishable from his relationship to a federal prisoner. The court of appeals correctly rejected that contention. Although the Attorney General does have a special role in the construction of immigration statutes, see 8 U.S.C. 1103(a) (1994 & Supp. V 1999); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999), his role with regard to the actual *detention* of aliens is "not materially different" from his role with regard to incarcerated prisoners. See Pet. App. 63.

a habeas corpus petition, and there was no question that relief could be awarded to the petitioner if the Kentucky officials (who were subject to the personal jurisdiction of the Kentucky district court) failed to grant the speedy trial, because those officials could be ordered to dismiss the indictment. See 410 U.S. at 486. The Court also noted that it was more consistent with the purposes of the habeas corpus statute for the matter to proceed in Kentucky, where the pertinent officials and records were located, than in Alabama, which had no connection to the dispute between the petitioner and the Kentucky officials. See *id.* at 494.

In discussing its earlier decision in *Ahrens* v. *Clark*, 335 U.S. 188 (1948), the Court in *Braden* observed that the proper forum for a habeas corpus petition will usually be where the petitioner is actually detained. See 410 U.S. at 495-497. Although the Court disapproved some of its reasoning in *Ahrens*—which had held that 120 aliens held in custody on Ellis Island could not proceed by habeas corpus petition against the Attorney General in the District of Columbia because the aliens were not within the territorial jurisdiction of the District of Columbia district court, see 335 U.S. at 191-193—the Court in *Braden* did not question that *Ahrens* had reached the correct result. Indeed, the Court noted that on the facts of *Ahrens*,

> [the] petitioners could have challenged their detention by bringing an action in the Eastern District of New York [which then had jurisdiction over Ellis Island] against the federal officials who confined them in that district. No reason is apparent why the District of Columbia would have been a more convenient forum, or why the Government should have undertaken the burden of

> transporting 120 detainees to a hearing in the District of Columbia. Under these circumstances, traditional principles of venue would have mandated the bringing of the action in the Eastern District of New York, rather than the District of Columbia.

Braden, 410 U.S. at 500. So too here, the proper forum for petitioner's challenge to his removal order is plainly the Western District of Louisiana, where he is held in detention, and not the District of Massachusetts.

Petitioner's reliance (Pet. 5) on *Ex parte Endo*, 323 U.S. 283 (1944), is likewise misplaced. In that case, this Court held that the United States District Court for this Northern District of California acquired subject-matter jurisdiction over a habeas corpus petition filed by a Japanese-American citizen subject to the evacuation orders of the War Relocation Authority when the habeas corpus petition was filed, and did not thereafter lose jurisdiction when the petitioner was removed to another judicial district. *Id.* at 304-305. The government represented to the Court that if the writ issued and was directed to any official with authority over the petitioner—specifically including an assistant director of the War Relocation Authority who was within the territorial jurisdiction of the California district court—he would be produced and the Court's order complied with in all respects. *Ibid.*

Petitioner also argues (Pet. 8-9) that permitting the Attorney General to be named as a respondent would promote efficiency and prevent forum shopping. That proposition is at a minimum highly debatable. If, as petitioner suggests, the Attorney General would be subject to the personal jurisdiction of every federal district court, then the habeas petitioner would be able to choose the judicial forum with the most favorable

case law (assuming venue requirements were met), rather than the forum most convenient for the litigation of his case. And while it may be true that requiring a habeas corpus petition to be brought in the district where the custodian is located may result in a concentration of habeas corpus petitions in a few judicial districts, that result does not necessarily outweigh the inefficiencies of permitting habeas corpus petitions to be adjudicated far from the district where the petitioner and the officials with actual custody are located. In any event, these considerations are more appropriately directed to legislative consideration. If Congress concludes that the habeas corpus statute as currently in effect results in inefficient adjudication, it can provide a legislative solution, as it did when it enacted 28 U.S.C. 2255 (1994 & Supp. V 1999), providing that federal prisoners may collaterally attack their sentences in the court where the sentence issued, and when it provided that petitions for review of final removal orders must be brought in the court of appeals for the judicial circuit where the immigration judge conducted the removal proceedings, see 8 U.S.C. 1252(b)(2) (Supp. V 1999).

2. Certiorari is also not warranted on the other issues identified in petitioner's "Questions Presented For Review" (Pet. ii). In those questions, which fall into two groups, petitioner argues, first, that the district court properly exercised subject-matter jurisdiction over his habeas corpus jurisdiction under 28 U.S.C. 2241, and second, that the BIA erred in ruling that he is not eligible for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994), because his removal proceeding was commenced after the repeal of Section 1182(c) became effective on April 1, 1997. The first issue is not presented in this case, because the court of appeals held that the district court did have

subject-matter jurisdiction under the habeas corpus statute. See Pet. App. 53. The second issue would arise only if the Court were to hold, contrary to the court of appeals' decision, that the Attorney General was a proper respondent to the habeas corpus petition and that the district court therefore had personal jurisdiction over this case. As discussed above, review of that threshold issue is not warranted.

Nor is a different disposition suggested by this Court's decision in *INS* v. *St. Cyr*, No. 00-767 (June 25, 2001). In *St. Cyr*, the Court held that an alien who is removable because of a conviction for an aggravated felony and who is barred by 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999) from raising a purely legal challenge to the validity of his final removal order by petition for review in the court of appeals may pursue that challenge by habeas corpus petition in district court. See *St. Cyr*, slip op. 7-24. Neither lower court in this case held to the contrary, however. Indeed, before this Court's decision in *St. Cyr*, the First Circuit had held, to similar effect, that an alien who is barred from pursuing a purely legal challenge to his final removal order in the court of appeals because of his aggravated-felony conviction could pursue that challenge by habeas corpus petition in the district court. See *Mahadeo* v. *Reno*, 226 F.3d 3, 8 (2000), cert. denied, No. 00-962 (June 29, 2001). The First Circuit then reached the same conclusion in this case, relying on *Mahadeo*. See Pet. App. 53. Thus, the lower courts' resolution of this case did not turn on any misapprehension about the scope of their subject-matter jurisdiction under the habeas corpus statute.

This Court's decision on the merits in *St. Cyr* also does not require any alteration of the lower courts' disposition of this case. Although the district court

ruled against petitioner on the merits, the court of appeals expressly vacated that decision and remanded the case for either a dismissal without prejudice on the merits or a transfer to the proper district court. Thus, the decision does not bar petitioner from pursuing his statutory challenge to his removal order in the proper federal district court. We also note that, unlike the alien in *St. Cyr*, petitioner was convicted of an aggravated-felony offense, not after a guilty plea, but rather after a jury trial. Cf. *St. Cyr*, slip op. 35-36 (ruling that application of repeal of Section 1182(c) to aliens who had pleaded guilty before that repeal's effective date would be contrary to presumption against retroactive application of statutes, because aliens who pleaded guilty "almost certainly relied upon [the significant likelihood of obtaining relief under Section 1182(c)] in deciding whether to forgo their right to a trial").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

DONALD E. KEENER
E. ROY HAWKENS
Attorneys

JULY 2001

APPENDIX A

U. S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Oakdale, Louisiana

File No. A40548483

IN THE MATTER OF
FRANCISCO XAVIER VASQUEZ, RESPONDENT

July 27, 1999

IN REMOVAL PROCEEDINGS

Transcript of Hearing

CHARGE: Section 237 (a) (2) (A) (iii);
Section 237 (a) (2) (B) (i).

APPLICATION:

ON BEHALF OF RESPONDENT:
Mr. Vega

ON BEHALF OFSERVICE:
Mr. Ramirez

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent's name is Francisco Xavier Vasquez is a male, by his own admission, a native and citizen of the Dominican Republic who this Court found to be

removable in proceedings conducted in this Court through the date of September 27, 1999. Based on evidence in the form of his own admissions, testimony of the documents introduced by the INS, which this Court finds to be clear and convincing evidence that the allegations in the Notice to Appear are, in fact, true, and that the Respondent is, therefore, removable as charged. After the finding of removability, the Respondent designated the Dominican Republic as the Country for removal, but does not seek any relief from removability because his attorney says there is no relief available to him.

There being no relief that the Court's aware, nor that the Respondent's attorney is aware of, or that the Government has indicated, it is ordered by the Court that the Respondent be removed from the United States to the Dominican Republic on the charges contained in the Notice to Appear.

_____

JOHN A. DUCK, SR.
Immigration Judge

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22011

File: A40 548 483 • Oakdale Date: {MAR 6 2000}

In re: FRANCISCO JAVIER VASQUEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
James C. Dragon, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. §1227(a)(2)(A)(iii)] - Convicted of aggravated felony.

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

Lodged: Sec. 237(a)(2)(A)(iiii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

ORDER:

PER CURIAM. In a decision dated September 27, 1999, an Immigration Judge, basing his finding on evidence in the record and on admissions made by the respondent through counsel, found the respondent to be

removable as an alien convicted of an aggravated felony and ordered him removed to the Dominican Republic. The respondent timely appealed. The Immigration and Naturalization Service has opposed the appeal, and adopted the Immigration Judge's decision as their brief. The respondent's appeal is dismissed.

The respondent bases his appeal in large part on alleged ineffective assistance of counsel. We find that the respondent has not met all the procedural requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd.* 857 F.2d 10 (1st Cir. 1988). The respondent's motion was supported by an affidavit from the respondent attesting to the facts relevant to the alleged ineffective assistance of counsel. There is also an indication that the accused counsel was informed of the allegations and allowed the opportunity to respond. However, the respondent has not filed a complaint with the appropriate disciplinary authorities or satisfactorily explained the failure to file such a complaint. The respondent stated that he was more concerned with reopening his immigration proceedings than filing a disciplinary complaint. This excuse does not convince us that the respondent has a legitimate case for ineffective assistance of counsel. If he has a legitimate case, he should file a complaint. Absent such a filing, we are unconvinced that the present appeal is based on a legitimate case of ineffective assistance of counsel.

Litigants are generally bound by the conduct of their attorneys, absent egregious circumstances. *See Matter of Lozada, supra*, at 639 (citing *LeBlanc* v. *INS*, 715 F.2d 685 (1st Cir. 1983)). The respondent wishes not to be bound by concessions made by his counsel (relating to whether or not he wished to request relief from removal; *see* Tr. at 17). Our review of the record does

not lead us to conclude that the respondent has shown egregious circumstances, particularly in light of his failure to file a complaint. There is, in short, insufficient evidence in the record to support the respondent's view of events relating to whether ineffective assistance of counsel occurred. The respondent appears to be using an ineffective assistance of counsel claim to prolong proceedings and to attempt to use a different strategy to obtain relief after an earlier strategy failed. The evidence in the record at this time does not lead us to find that the respondent has a meritorious claim of ineffective assistance of counsel or that we should disregard concessions made through counsel at the hearing below. *See Matter of Lozada, supra,* at 639 (discussing the requirement that disciplinary authorities be notified of breaches of professional conduct as a mechanism to deter meritless claims of ineffective assistance of counsel).

The respondent, on appeal, has also requested a remand for the purposes of exploring his eligibility for relief. The respondent has not shown that the evidence he seeks to present was unavailable and could not have been presented previously. *Cf. INS* v. *Abudu,* 485 U.S. 94 (1988) (discussing motions to reopen based on new evidence). Nothing in the record persuasively establishes a prima facie case for asylum, withholding of removal or protection under the Convention Against Torture. The respondent has submitted newspaper articles indicating that deportees from the United States have committed many crimes in the Dominican Republic and are subject to police surveillance, and are generally considered to be likely criminal suspects. This does not constitute, without more, a claim of persecution or of government-sponsored torture, as the respondent would argue.

The respondent was convicted of an aggravated felony[5] and is not eligible for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), (which does not exist in removal proceedings) or section 240A(a) of the Act, 8 U.S.C. § 1229b(a) (which provides for cancellation of removal for certain permanent residents who meet certain requirements regarding length of time in the United States and who have not committed an aggravated felony).[6] The respondent, as a lawful permanent resident who has been convicted of an aggravated felony since the date of his admission as a lawful permanent resident, is not eligible for relief under section 212(h) of the Act. *See Matter of Yeung*, 21 I&N Dec. 610 (BIA 1997) (specifically holding that an alien who has been admitted to the United States as a

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[5] The respondent argues that he was sentenced to eighteen months imprisonment for theft-related crimes but that the court docket indicates he was only to serve 6 of the 18 months; therefore, he asserts, the conviction record does not support a finding that he was convicted of an aggravated felony. Section 101(a)(48)(B) of the Act, 8 U.S.C. § 1101(a)(48)(B), states that "[a]ny reference to a term of imprisonment with respect to an offense is deemed to include the period of incarceration ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." As the respondent was clearly sentenced to 18 months, his argument that only 6 of the months should be counted is unpersuasive.

[6] The respondent cites non-binding case law from federal district courts in the First and Second Circuits, arguing that he is eligible for section 212(c) relief because at the time of his conviction such relief might have been available to him. *See* Respondent's Br. at 6-7. We note that the respondent has cited no precedent case that stands for the proposition that section 212(c) relief is available in removal proceedings initiated after the repeal of section 212(c) where an individual was found guilty of an aggravated felony after a jury trial.

lawful permanent resident and who has been convicted of an aggravated felony since the date of such admission is ineligible for a waiver under section 212(h) of the Act). In short, there are no compelling or substantial reasons for remanding this case.

The respondent argues that his convictions for distribution of cocaine were vacated. This argument is without any dispositive significance, as the respondent is removable as an aggravated felon based on his theft-related conviction. The respondent conceded this point at the hearing below. *See* Tr. at 5.

For the foregoing reasons, the respondent's appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD